IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. [redacted] 341

LOUIS K. LIGGETT COMPANY,

Appellant,

vs.

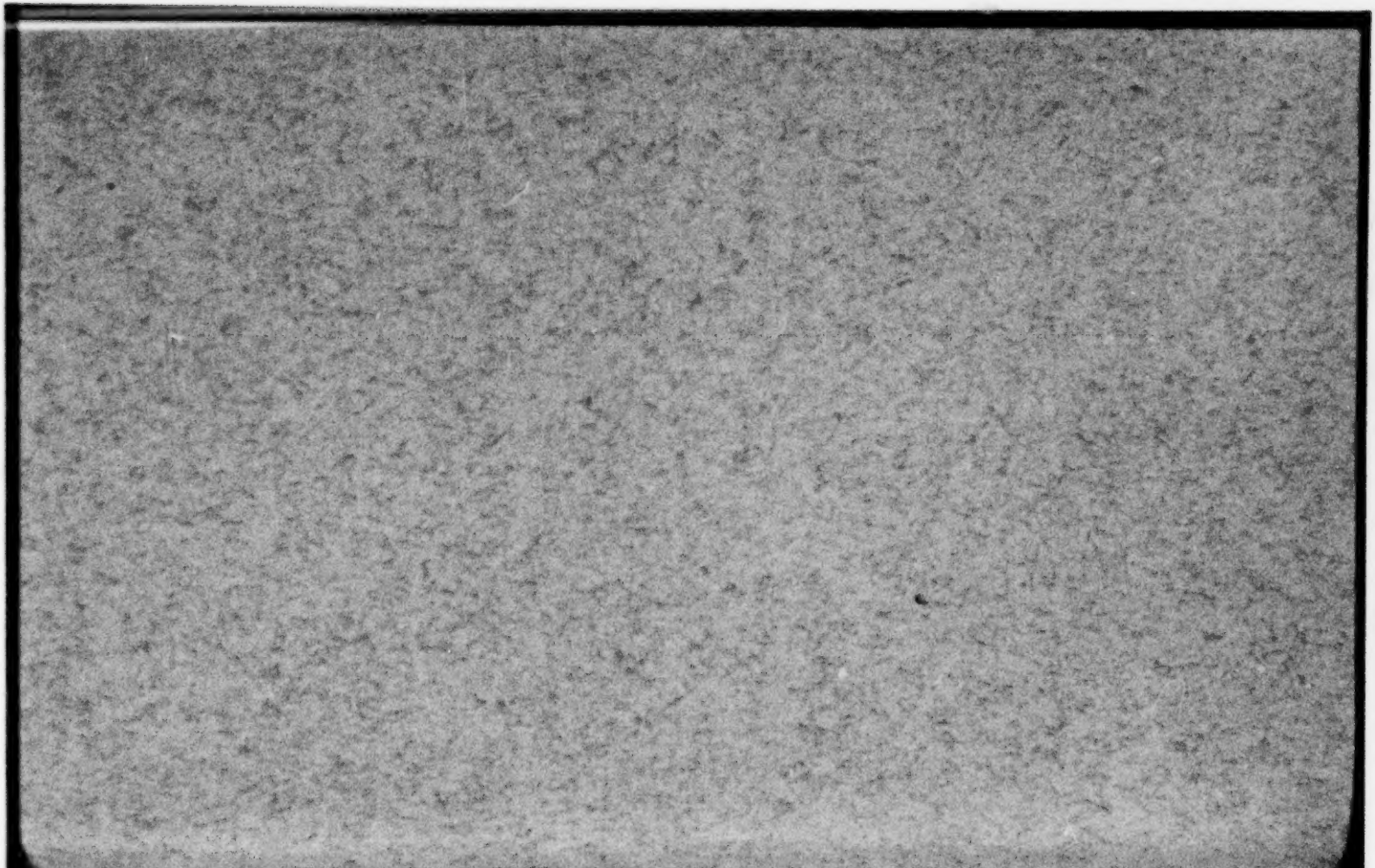
THE HONORABLE THOMAS J. BALDRIGE, Attorney General of the Commonwealth of Pennsylvania; CHARLES C. CAMPBELL, CHARLES F. KRAMER, et al., etc., et al.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR APPELLANT.

GEORGE O. CHANDLER,
ROY M. STEPHE,
OWEN J. ROBERTS,
Attorneys for Appellant.

Press of Allen, Lane & Scott, Philadelphia.



INDEX.

PAGE

A. OFFICIAL REPORT OF THE OPINION BELOW 1

B. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED 2

C. STATEMENT OF THE CASE 3

D. ERRORS RELIED ON 9

E. THE TEXT OF THE ACT OF MAY 13, 1927 .. 11

F. ARGUMENT 14

I. Preliminary Statement 14

II. Prior Police Legislation in Force .. 15

(a) *No matter who owned a drug store, no one, pharmacist or non-pharmacist, owner or employee, except a physician could prescribe for illness* .. 15

(b) *No matter who owned the store, only a certain quality of drugs could be used or sold therein* 17

(c) *No matter who owned the store, none but a duly educated and licensed registered pharmacist could compound prescriptions therein* 20

PAGE

(d) *No matter who owned the store, none but a registered pharmacist could be in charge thereof, and he could be in charge of but one store* 21

(e) *No matter who owned the store, it must be registered, and could only be registered if under the supervision of a registered pharmacist* 24

III. The Scope of the Act of May 13, 1927 28

IV. The Effect of the Act 30

V. It is destructive of Appellant's Property Rights to deprive it of the Right to do Business in any other Cities or at any other Locations than those in which it had units on May 13, 1927; and when such Destruction is accomplished without any Benefit to the Public, this is a Deprivation of Property without Due Process of Law 32

A Law forbidding the Expansion of Chain Drug Stores is not a Health Regulation, and is not a Proper Exercise of the Police Power 32

PAGE

VI. The Ownership of Drug Stores by a Particular Class is not necessary to the Preservation of Public Health; and the Natural Effect of the Act is simply to give a Monopoly of the Retail Drug Store to Pharmacists. This is not Police Regulation 47

VII. The Act cannot be sustained as a Police Regulation because of the Lack of Logical Connection between its alleged Object and the Means adopted to accomplish that Object 61

VIII. The Act denies to the Appellant the Equal Protection of the Law 74

IX. The Ownership of Property is not a Profession. The Practice of Pharmacy is not, properly speaking, a Profession, but if it is, that Fact does not justify depriving Corporations of Business and Property Rights merely because a Certificate of Competency is required of the Corporation's Employee Pharmacists 78

X. Errors in the Opinion of the Court Below 89

XI. Errors in the Opinion of the Court of Common Pleas of Philadelphia County 106

G. CONCLUSION 111

INDEX OF CASES CITED.

PAGE

A.

Adams *vs.* Tanner, 244 U. S. 590 (1917)..... 69
Allgeyer *vs.* Louisiana, 165 U. S. 578 (1897)..... 35
Atkinson T. & S. F. R. *vs.* Vosburg, 238 U. S. 156 (1915)..... 74

B.

Burns Baking Co. *vs.* Bryan, 264 U. S. 504 (1924).61, 63, 64
Burnes Nat. Bank *vs.* Duncan, 265 U. S. 17 (1924).. 45

C.

City of Danville *vs.* Quaker Maid, Inc., 211 Ky. 677 (278 S. W. 98) (1926)..... 42
Clark *vs.* Poor, 274 U. S. 554 (1927)..... 2
Commonwealth *vs.* Johnson, 144 Pa. 377 (1891)...48, 89
Commonwealth *vs.* Zacharias, 3 Pa. Super. Ct. 264 (181 Pa. 126) (1897).....31, 47, 80, 90

E.

Ex Parte Buder, 271 U. S. 461 (1926)..... 2

F.

Fairmont Creamery *vs.* Minnesota, 274 U. S. 1 (1927).....61, 69, 70, 71, 72, 73
Frost *vs.* Railroad Commission, 271 U. S. 583 (1926). 35

G.

Great Atlantic & Pacific Tea Co., *vs.* Doughton, Commissioner of Revenue, Superior Court of Wake County, North Carolina, (not officially reported)..... 39

H.

Hanover Fire Insurance Co. *vs.* Harding, 272 U. S. 494 (1926)..... 35

PAGE

K.

Kentucky Finance Corporation *vs.* Paramount Exchange Corporation, 262 U. S. 544 (1923)..... 74

Keystone Grocery & Tea Co. *vs.* William A. Huster, No. 10, 922 in Equity Circuit Court of Allegany County, Maryland..... 39

L.

Lawton *vs.* Steele, 152 U. S. 133 (1894).....45, 46

M.

Michigan Public Utilities *vs.* Duke, 266 U. S. 570 (1925) 93

Moore *vs.* Fidelity & Deposit Company, 272 U. S. 317 (1926)..... 2

Mugler *vs.* Kansas, 123 U. S. 623 (1887).....44, 45

N.

Noel *vs.* People, 187 Ill. 587 (1900)..45, 50, 51, 52, 53, 54, 97, 99

P.

People *vs.* Harrison, 170 N. Y. App. Div. 802 (1915). 56

People *vs.* Ringe, 197 N. Y. 143 (1910)..... 55

Pierce *vs.* Society, 268 U. S. 510 (1924)..... 35

S.

Saddler *vs.* People, 188 Ill. 243 (1900).....50, 54

Schlesinger *vs.* Wisconsin, 270 U. S. 230 (1926)..... 69

Smith, *et al.*, *vs.* Wilson, *et al.*, 273 U. S. 388 (1927). 2

State *vs.* Childs, 257 Pac. 366 (Ariz.) (1927)..50, 92, 93, 97, 99

State *vs.* Donaldson, 41 Minn. 74 (1889).....50, 97, 99

State of South Dakota *vs.* P. E. Wood, 215 N. W. 487 (1927).....50, 91, 92, 97, 99, 100, 101, 102, 103

T.

Truax *vs.* Corrigan, 257 U. S. 312 (1921)..... 74

Tucker *vs.* New York State Board, etc., 217 N. Y. S. 217 (1926)..... 57

W.

Weaver *vs.* Palmer Bros. Co., 270 U. S. 402 (1926). 61, 66, 67, 69

Wyeth *vs.* Board of Health, 200 Mass. 474 (1909)... 56

CHRONOLOGICAL INDEX OF PENNSYLVANIA STATUTES CITED.

PAGE

Act of May 8, 1909, Pamphlet Laws 470. . 17, 49, 65, 90, 100
Sec. 1. 17
Sec. 5. . . . . 17, 68
Sec. 7. 68
Sec. 8. 18
Act of June 3, 1911, Pamphlet Laws 639 . . . . . 15, 93
Sec. 1. 15
Act of May 17, 1917, Pamphlet Laws 208 . . 5, 20, 22, 49, 80, 107
Sec. 1. . . . . 4, 22, 29
Sec. 2. . . . . 22, 68
Sec. 11 . . . . . 23, 68
Sec. 13. 20
Sec. 14 23
Sec. 15. . . . . 23, 85
Sec. 21. 24
Act of June 7, 1917, Pamphlet Laws 564 18
Sec. 2. 18
Act of July 11, 1917, Pamphlet Laws 758. 26
Sec. 7. 26
Act of June 17, 1919, Pamphlet Laws 1031 26
Sec. 1. 26
Act of April 21, 1921, Pamphlet Laws 242 27
Sec. 1. 27
Act of May 26, 1921, Pamphlet Laws 1172 . . 5, 25, 90, 109
Sec. 2. 25
Sec. 3. 25

PAGE
Act of May 7, 1923, Pamphlet Laws 139..... 27
Sec. 1..... 27
Act of April 27, 1927, Pamphlet Laws 548.....19, 90
Sec. 1..... 19
Act of May 13, 1927, Pamphlet Laws 1009..3, 6, 7, 11–13, 28–31, 42, 74, 82, 83, 96
Sec. 1.....11, 12, 13
Sec. 2..... 13

MISCELLANEOUS INDEX.

12 Corpus Juris 929..... 61

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927. No. 673.

Louis K. Liggett Company, Appellant,

vs.

The Honorable Thomas J. Baldrige, Attorney General of the Commonwealth of Pennsylvania; Charles C. Campbell, Charles F. Kramer, et al., etc., et al.

BRIEF FOR APPELLANT.

A. OFFICIAL REPORT OF THE OPINION BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported in 22 Fed. (2d) 993 (1927).

B. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(1). The decrees to be reviewed are those of a specially constituted statutory court of the District Court under section 266 of the Judicial Code; and are dated December 22, 1927 (R. 83-84).

(2). The jurisdiction of this Court is based upon section 266 of the Judicial Code, as amended by the Act of February 13, 1925.

(3). The following cases are believed to sustain such jurisdiction, namely:

Clark vs. Poor, 274 U. S. 554 (1927);
Smith, et al., vs. Wilson, et al., 273 U. S. 388 (1927);
Moore vs. Fidelity & Deposit Co., 272 U. S. 317 (1926);
Ex Parte Buder, 271 U. S. 461 (1926).

C. STATEMENT OF THE CASE.

This appeal challenges the constitutionality of the Pennsylvania act of May 13, 1927.

This act contains *no provision* respecting the compounding of drugs, chemicals or poisons, the quality or strength of the same, the sale of the same, the compounding of prescriptions, the advertising of drugs, the labelling of the same, methods or procedure in drug stores, the competency of employees therein, or the persons permitted to serve the public therein.

All of the above matters are fully and adequately covered by other legitimate police legislation in Pennsylvania.*

The act of May 13, 1927, deals solely with the *ownership of drug stores*, ignoring all else.

The appellant contends that the act, on its face, interferes with the innocent and lawful ownership of property and unconstitutionally deprives it of business rights.

Retail drug stores in the United States sell and deal in drugs, medicines (including standard formula and proprietary medicines and household drugs, already prepared and packaged for sale, and medicines compounded on the premises by licensed pharmacists from physicians' prescriptions or formulae, and sold on individual order), bandages, absorbent cotton, thermometers, hot water bottles, and hospital and sick room utensils and supplies, dentrifices, tooth

* See the acts quoted pp. 15-27, *infra*

brushes, soaps, cosmetics, creams, powders and articles of personal hygiene, cigars, candy and soda fountain drinks (R. 63, and common knowledge).

The backbone of the business is found in the closely related medicine, prescription and hospital departments, together with the fancy or toilet goods departments, which do about 63% of the business, and which characterize the business as a drug business. The other departments, cigar, candy and soda, have long been associated, as a matter of fact and in the public mind, with drug stores, and are usually found in retail drug stores (R. 63).

Under the laws of Pennsylvania a "pharmacy" is a "retail drug store," which in turn is a place where drugs or medicines are compounded and sold at retail (Act of May 17, 1917, as amended, Sec. 1, *infra*, p. 22).

A licensed pharmacist *is a chemist* in pharmaceuticals who has been examined and granted a certificate of competency and registered as a pharmacist.

The Liggett Company is a Massachusetts corporation. Since 1909 it has fulfilled its charter purpose of owning and conducting retail drug stores in the several States (R. 40, 47).

Since March 1, 1916, it has been duly registered in Pennsylvania as a foreign corporation. Its certificate of registry authorizes it to conduct "retail drug stores" (R. 67, par. 1).

On May 12, 1927, its business in Pennsylvania was being carried on at twenty-eight retail drug

stores, in thirteen cities and towns. Sixteen of these stores were located in Philadelphia, and one in each of twelve other cities and towns, namely, Pittsburgh, Erie, Reading, Wilkes-Barre, Johnstown, Lancaster, York, Easton, Williamsport, Altoona, Chambersburg and Chester. These stores represented an investment of $480,000. Appellant's gross business for 1926 in the State was $2,899,789.88, of which $163,487.40 (something over 6%) was in prescriptions, and $793,-849.86 (approximately 29%) in medicines and articles of standard formulae, and a little less than 6% in hospital goods, and 22% in the fancy goods department. Of the balance approximately 6% was in candy, 14% in cigars and cigarettes, and 16% in soda fountain business (R. 3, 40, 42, 47, 49, 63).

All of said twenty-eight retail drug stores of the Liggett Company are under the management and personal supervision of pharmacists duly registered as such under the Pennsylvania Act of May 17, 1917, P. L. 208 (each of said pharmacists having personal supervision of not more than one drug store); and all of said stores are duly registered with and have permits issued by the Pennsylvania Board of Pharmacy under the Act of May 26, 1921, P. L. 1172 (R. 3, 4, 40, 47).

To meet the increasing demands of its business and in consummation of negotiations begun months before appellant knew anything of the contemplated enactment of the ownership law, the Liggett Company, on May 11, 1927, contracted to buy a retail

drug business in Pottsville, Pennsylvania. It had also on February 20th, 1926, rented a building, possession of which was to be taken July 15th, 1927, for a new store in Philadelphia, and was preparing, in accordance with the normal course of its business, to establish other stores in Pennsylvania, in cities and towns and at locations where it previously had had no stores (R. 4-5).

On May 13, 1927, the act in question became a law.*

The Liggett Company, like every other corporation, foreign or domestic, every partner, every individual owning any interest in a drug store, was thereupon confronted with a statutory declaration **making it a crime for any but a licensed pharmacist,**

(*a*) to own a pharmacy;

(*b*) to be a partner in a firm owning a pharmacy;

(*c*) to own a share of stock in a corporation owning a pharmacy.

That the act is not a police regulation is evident from the fact that any individual owner, though not a registered pharmacist, and any partnership or corporation, though not composed solely of registered pharmacists, which at the date of the act owned a pharmacy, may continue to do so, but must not own *any new pharmacies*. Further that, though not a registered pharmacist, an administrator, executor or trustee of a deceased owner may own such pharmacy so long as necessary to settle the estate. Further that the act specifically permits the owner-

* The act is printed in full, *infra*, pp. 11-13.

ship by a person, not a registered pharmacist, of a store in which are sold proprietary medicines and household drugs put up, *inter alia,* by *wholesale grocers.*

The purchase of the Pottsville store and the opening of its new Philadelphia store would involve a criminal prosecution and heavy fines under the provisions of the Act here in question, although its business admittedly has been conducted in strict compliance with the laws and regulations relating to the compounding and sale of medicines and the operation of drug stores (R. 47, 54).

Confronted with the Act of May 13th, 1927, depriving it of its constitutional rights, *i. e.,* the right to own these stores, the appellant on June 4th, 1927, filed its bill to prevent the State Board of Pharmacy, the Attorney-General of the Commonwealth of Pennsylvania and the District Attorneys for Philadelphia and Schuylkill Counties, from enforcing against it the provisions of the Act of May 13, 1927, and it prayed for a preliminary injunction (R. 1 and 8).

The statutory court (Wooley, *Cir J.,* Dickinson, *D. J.,* and Kirkpatrick, *D. J.*), apparently not considering that the contract to purchase the Pottsville store (although the store was to be taken over within a few days after the date of the preliminary hearing) created sufficient immediacy of danger of prosecution, refused, or delayed action, on a preliminary injunction (R. 64).

It granted leave to plaintiff, however, to renew its motion for a preliminary injunction (R. 64).

Thereafter plaintiff filed a supplemental bill, showing that it had completed the purchase of the Pottsville store (R. 64).

Later, after the defendants had answered, plaintiff renewed its motion for a preliminary injunction (R. 74), based on its conduct of the Pottsville store, its purchase of a drug store at Hanover, Pa., and the expressed refusal of the Pennsylvania Board of Pharmacy to grant a license therefor and the expressed intention of the Attorney-General to prosecute Liggett Company under the act (R. 75-77).

The case being then at issue, on the bills and answers filed, and on the evidence contained in the affidavits and stipulations on file, the statutory court of three judges by interlocutory decree denied the pending motion for a preliminary injunction (R. 83); and by final decree (R. 84) dismissed the bill for want of equity.

From this action the plaintiff, Liggett Company, took the present appeal.

D. ERRORS RELIED ON.

1. The court erred in denying plaintiff's motion for a preliminary injunction.

2. The court erred in holding that plaintiff's bill should be dismissed for want of equity.

3. The court erred in holding that the Act of May 13, 1927, was a proper exercise of the police power.

4. The court erred in holding that there was a reasonable relation between the mere ownership of a drug store and the safeguarding of the public health.

5. The court erred in holding that there is a logical connection between the alleged object of the Act—namely the conservation of the public health—and the means adopted to accomplish that object—namely the limitation of ownership of drug stores to licensed pharmacists or corporations or partnerships composed of licensed pharmacists.

6. The court erred in holding that it was a valid exercise of the police power to require the plaintiff corporation, in order to own drug stores, to compel each of its stockholders, or every person owning an interest in its business, to become a registered pharmacist.

7. The court erred in holding that the mere ownership of stock in a drug store conducted solely by a registered pharmacist, might be denounced as a crime under the police power.

8. The court erred in not holding the act of May 13, 1927, violative of the Fourteenth Amendment of the Constitution of the United States.

E. THE TEXT OF THE ACT OF MAY 13, 1927.

(Pa. Pamph. Laws 1927, p. 1009.)

The act in full is as follows:—

"A Supplement.

"To the act, approved the seventeenth day of May, one thousand nine hundred and seventeen (Pamphlet Laws two hundred and eight), entitled 'An act to regulate the practice of pharmacy and sale of poisons and drugs, and providing penalties for the violation thereof; defining the words "drugs" and "poison"; and providing for the appointment of a board which shall have in charge the enforcement of said law, and the power to make rules and regulations for the enforcement of said law; and providing for the purchase of samples of drugs for determining their quality, strength, and purity,' regulating the ownership of pharmacies and drug stores; and providing penalties.

"Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met and it is hereby enacted by the authority of the same That every pharmacy or drug store shall be owned only by a licensed pharmacist, and no corporation, association or co-partnership shall own a pharmacy or drug store, unless all the partners or members thereof are licensed pharmacists; except that any corporation organized and existing under the laws of the Common-

wealth or of any other state of the United States, and authorized to do business in the Commonwealth, and empowered by its charter to own and conduct pharmacies or drug stores, and any association or copartnership which, at the time of the passage of this act, still owns and conducts a registered pharmacy or pharmacies or a drug store or drug stores in the Commonwealth, may continue to own and conduct the same; but no other or additional pharmacies or drug stores shall be established, owned, or conducted by such corporation, association, or copartnership, unless all the members or partners thereof are registered pharmacists; but any such corporation, association, or copartnership, which shall not continue to own at least one of the pharmacies or drug stores theretofore owned by it, or ceases to be actively engaged in the conduct of a pharmacy, shall not be permitted thereafter to own a pharmacy or a drug store, unless all of its partners or members are registered pharmacists; and except that any person, not a licensed pharmacist, who, at the time of the passage of this act, owns a pharmacy or a drug store in the Commonwealth, may continue to own and conduct the same, but shall not establish or own any additional pharmacy or drug store, or if he or she ceases to operate such pharmacy or drug store, shall not thereafter own a pharmacy or drug store, unless he or she be a registered pharmacist; and except that the administrator, executor, or trustee

of the estate of any deceased owner of a registered pharmacy or drug store, may continue to own and conduct such pharmacy or drug store during the period necessary for the settlement of the estate: Provided, That nothing in this section shall be construed to prevent or affect the ownership, by other than a registered pharmacist, of a store or stores wherein the sale of manufacture of drugs or medicines is limited to proprietary medicines and commonly used household drugs, provided such commonly used household drugs are offered for sale or sold in packages which have been put up ready for sale to consumers by pharmacists, manufacturing pharmacists, wholesale grocers, or wholesale druggists.

"SECTION 2. Any person, copartnership, or corporation, violating the provisions of this act, shall be guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to pay a fine of not more than one hundred dollars. Each day any such pharmacy is owned contrary to the provisions of this act shall be considered a separate offense."

F. ARGUMENT.

I. Preliminary statement.

Appellees have planted their defense of the act solely on the police power. They state in their answer (R. 69, par. 18) and in their affidavits (R. 56, par. 11; R. 59, par. 11) that the act "was enacted by the legislature of the Commonwealth of Pennsylvania, by virtue of the police power inherent in it to legislate for the public good, health and welfare."

We insist that the act is not in any proper sense an exercise of the police power, because:

It does not purport to be an exercise of the police power.

That power, as regards the drug store business, has been fully and adequately exercised by other and prior legislation, to which the present act bears no logical relation whatever.

The act is a crass attempt to interfere with the lawful ownership of property, and to create a monopoly.

In view of the existing state of the law when this act was passed, and in view of the very terms of the act, one need not seek far to discover the sole purpose of its passage. The registered pharmacist desires a monopoly of the business of vending drugs and proprietary medicines and compounding prescriptions. He does not want the competition of partnerships, corporations, and chain stores. He procures this act to be passed and the competition he fears is to a great extent at once eliminated and will ultimately be utterly destroyed.

II. Prior police legislation in force.

It is demonstrable that prior and existing police legislation in Pennsylvania covered every phase of the manufacture and sale of drugs. This legislation, as will at once be apparent, could not be effective if it had dealt with the mere matter of the ultimate *ownership* of the business. Ownership is a passive state. Compounding prescriptions, buying and selling drugs and chemicals, requires an act or acts. Obviously, legislation to have any real relation to the preparation of drugs, the qualifications of persons compounding prescriptions and the sale of medicines of the proper standard, must operate upon the actor. Such was the police regulation of the conduct of a drug store prior to the act of May 13, 1927, as shown by the following:

As a preliminary proposition, it is to be noted that

> (a) *No matter who owned a drug store, no one, pharmacist or non-pharmacist, owner or employee, except a physician, could prescribe remedies for illness.*

Act of June 3, 1911, P. L. 639. (West Pa. Statutes, Sec. 16,799.)

> SEC. 1. On and after January first, nineteen hundred and twelve, it shall not be lawful for any person in the State of Pennsylvania to engage in the practice of medicine and surgery, or to hold himself or herself forth as a practitioner in medicine and surgery, or to assume the title of

> doctor of medicine and surgery, or doctor of any specific disease, or to diagnose diseases, or *to treat diseases by the use of medicines and surgery*, or to sign any death certificate, or to hold himself or herself forth as able to do so, excepting those hereinafter exempted, unless he or she has first fulfilled the requirements of this act and has received a certificate of licensure from the Bureau of Medical Education and Licensure created by this act, which license shall be properly recorded in the office of the Superintendent of Public Instruction at Harrisburg. (Italics ours.)

In view of the foregoing, it is evident how far afield the court below went when, as the basis of its decision, it said, "the local pharmacist or druggist serves many of his customers as their physician." (R. 81, middle.) There is, of course, no evidence in the record to support this statement. If any one had offered such evidence, he would have been offering evidence that many people were violating a criminal statute, and going unpunished.

We think, however, first that the court was badly in error in its supposed judicial notice of such fact. We believe that pharmacists do obey the law and refrain from prescribing remedies for illness. But if they do not, the state cannot stop their illegal practices by providing that they alone shall *own* drug stores. That certainly will not stop the evil practice. The way to stop it, if it exists, is to enforce the statute above quoted.

(b) ***No matter who owned the store, only a certain quality of drugs could be used or sold therein.***

The pure drug law provides (Act of May 8, 1909, P. L. 470; West Pa. Statutes Sec. 9,337):

> SEC. 1. It shall be unlawful for any person, partnership or corporation to manufacture or sell, offer for sale, or have in possession with intent to sell, any drug which is adulterated or misbranded, within the meaning of this act.
>
> SECTION 5. That the enforcement of this act shall be entrusted to the State Pharmaceutical Examining Board, who shall receive as compensation for their services the same *per diem* and expenses that they receive as members of the State Pharmaceutical Examining Board, under the act of May twenty-four, one thousand eight hundred and eighty-seven. They shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examination of specimens of drugs manufactured or offered for sale in the State; and shall appoint an executive secretary, who shall work under the directions of said board; and they shall also have power to employ such agents, chemists, attorneys, and assistants as may be necessary for this purpose, and they, or their duly authorized agents shall have the right to enter any place where drugs are compounded, dispensed, or sold, for the purpose of purchasing samples; and shall have the right to purchase samples in order that tests may be made to determine whether such drugs conform to the standards of strength, quality, and purity

as fixed by the laws of this Commonwealth. Any person who intentionally prevents or knowingly refuses, to permit any authorized person to enter any place where drugs are compounded, dispensed, or sold, for the purpose of purchasing samples, or refuses to sell a sample or samples of drugs for the purpose of examination, shall, upon conviction, be sentenced to pay a fine of ten dollars ($10.00) and costs of prosecution. Provided, however, that this section shall not be construed as granting any right or privilege to said board, or their agents thereof, of inspecting any place where drugs are sold or manufactured, or any formula or process of manufacture of any drug.

SECTION 8. That it shall be the duty of each district attorney, to whom the Board shall report any violation of this act, to cause appropriate proceedings to be commenced and prosecuted in the proper court, without delay, for the collection of the penalties in such case made and provided.

Act of June 7, 1917, P. L. 564 (West Pa. Statutes, Sec. 9,338).

SEC. 2. That the term "drug," as used in this act, shall include all medicines and preparations recognized in the ninth revision of the Pharmacopoeia of the United States, the fourth edition of the National Formulary, or the American Homeopathic Pharmacopoeia, for the internal or external use, and any substance or mixture of substances, intended to be used for the cure, mitigation, or prevention of disease of either man or other animals.

Act of April 27, 1927, P. L. 458 (West Pa. Statutes, Sec. 9,339).

SEC. 1. For the purpose of this act an article shall be deemed to be adulterated:

First.—If a drug is sold under or by any name recognized by the tenth revision of the Pharmacopoeia of the United States, the fifth edition of the National Formulary, or the American Homeopathic Pharmacopoeia, it differs from the standard of strength, quality, or purity as determined by the test or formula laid down in the tenth revision of the Pharmacopoeia of the United States, the fifth edition of the National Formulary, or the American Homeopathic Pharmacopoeia: Provided, That no drug defined in the tenth revision of the Pharmacopoeia of the United States, the fifth edition of the National Formulary; or the American Homeopathic Pharmacopoeia, except official preparations of opium, iodine, peppermint, camphor, ginger, and ethyl nitrit, shall be deemed to be adulterated, under this provision, if the standard of strength, quality, or purity be plainly stated, in juxtaposition with the official standard of strength, quality, and purity, upon the bottle, box, or other container thereof, although the standard may differ from that determined by the test or formula laid down by the tenth revision of the Pharmacopoeia of the United States, the fifth edition of the National Formulary, or the American Homeopathic Pharmacopoeia.

Second.—If the strength or purity fall below the professed standard or quality under which it is sold.

In view of the foregoing, it seems needless to point out that the wholesaler of drugs, and the man who compounds and sells them in the retail drug store (the registered pharmacist), and the owner of the store, whether he be a registered pharmacist or not, are all alike bound by the law as to pure drugs.

Will conferring a monopoly of *ownership* of retail drug stores on registered pharmacists, compel the manufacturers of drugs, who supply the retail stores, to comply with the law as to constituents of drugs and purity? To ask the question is to answer it.

(c) *No matter who owned the store, none but a duly educated and licensed registered pharmacist could compound prescriptions therein.*

Act of May 17, 1917, P. L. 208 (West Pa. Statutes, Sec. 9,323).

SEC. 13. That hereafter it shall be unlawful to sell drugs, medicines, or poisons at retail, *or to compound physicians' prescriptions*, or to conduct a pharmacy, or to practice as a pharmacist or assistant pharmacist, except in compliance with the provisions of this act of Assembly: Provided, however, That nothing in this act of Assembly shall be so construed as to interfere with students of pharmacy, or other employees in a pharmacy, from performing such duties as may be assigned to them by and under the supervision of a pharmacist or assistant pharmacist: And provided further, That the compounding of physicians' prescriptions, or the dispensing and selling of poisons at retail, shall not be permitted except under the strict supervision

and in the presence of a pharmacist or assistant pharmacist. (Italics ours.)

Nothing in this act of Assembly shall be construed so as to prevent an authorized practitioner of medicine from administering or dispensing such drugs to bona fide patients as he or she shall deem necessary: Provided, however, That such drugs so administered or dispensed shall conform to the standards of strength, quality, and purity as fixed by the laws of this Commonwealth; nor prevent the sale or manufacture of proprietary medicines; nor prevent storekeepers from dealing in and selling commonly used household drugs when the same are offered for sale or sold in packages which have been put up ready for sale to consumers by pharmacists, manufacturing pharmacists, wholesale grocers or wholesale druggists. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be sentenced to pay a fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00), or imprisonment for not more than one year, or either or both, in the discretion of the court.

If this was true, how did it help matters to put the ownership of the store in the man who under the law was the only man who could compound prescriptions? Echo answers, how.

(d) *No matter who owned the store, none but a registered pharmacist could be in charge thereof, and he could be in charge of but one store.*

Act of May 17, 1917, P. L. 208 (West Pa. Statutes, Sec. 9,324).

SECTION 1. That (*a*) the term "pharmacy," when not otherwise limited, shall, for all the purposes of this act, be taken to mean a retail drugstore, or any place *where drugs, medicine, or poisons are compounded, dispensed, prepared, or sold at retail;* (*b*) the term "drug," as used in this act, shall include all medicine and preparations recognized in the United States Pharmacopoeia, the National Formulary, or the American Homeopathic Pharmacopoeia, for internal and external use, and any other substance, or mixture of substances, intended to be used for the cure, mitigation, or prevention of disease of either man or other animals; (*c*) *the term "pharmacist" shall, for all purposes of this act, be deemed to mean a person who is properly registered, in accordance with this act of Assembly, as a pharmacist;* (*d*) the term "assistant pharmacist" shall, for all the purposes of this act, be deemed to mean a person who is properly registered in accordance with this act of Assembly, as an assistant pharmacist: • • • (Italics ours.)

SECTION 2. State Board of Pharmacy.—The State Board of Pharmacy shall consist of the Superintendent of Public Instruction ex-officio and five persons, who shall be appointed for terms of six years from among the most skillful pharmacists in Pennsylvania, who are not teachers or instructors in any educational institution teaching pharmacy. • • •

And the said board shall have the right to employ chemists, agents, and clerks for the pur-

pose of carrying out the terms and conditions prescribed by this act of Assembly. * * *

SECTION 11. *That the Pennsylvania Board of Pharmacy shall enforce the provisions of this act of Assembly, investigate all complaints and charges of noncompliance, and prosecute all persons so offending whenever reasonable ground shall appear for such actions.* All fines imposed through a violation of this act shall be paid to the Secretary of the Pennsylvania Board of Pharmacy, and by him paid into the State Treasury, for use in the enforcement of this act of Assembly. (Italics ours.)

SEC. 14. That it shall be lawful for a pharmacist to take, use, and exhibit the titles: "pharmacist," "pharmacy," "druggist," "apothecary," or "drug store;" and to have charge of, engage in, conduct, or carry on, *for himself or for another*, the dispensing, compounding, or sale of drugs, chemicals, medicines, prescription, or poisons, anywhere within the State; *but he shall have personal supervision of not more than one pharmacy at the same time.* (Italics ours.)

It shall be lawful for an assistant pharmacist to take, use, or exhibit the title, "assistant pharmacist"; and to assist in the dispensing, compounding, or retailing of drugs, chemicals, medicines, prescriptions, or poisons, in a pharmacy *which is under the management and personal supervision of a pharmacist registered under the provisions of this act.* He may also perform such duties during the temporary absence of the pharmacist regularly in charge. (Italics ours.)

SECTION 15. That it shall be unlawful for any person, firm, or corporation to use the title:

"pharmacist," "assistant pharmacist," "druggist," or "apothecary," except as authorized by this act of Assembly, or hereafter to conduct or transact business under a name which contains as part thereof, with or without qualifying words, syllables, prefixes, or suffixes, the words: "drug store," "pharmacy," "medicine store," "medicine shop," or "drug shop," or any term having a similar meaning, or in any manner by advertisement, circular, poster, sign, symbol, insignia, or otherwise, describe or refer to the place of business conducted or carried on by such person, firm, or corporation, by the terms "drug store," "pharmacy," or any other term having a similar meaning unless the place of business is a drug store or pharmacy duly registered and authorized by the State Board of Pharmacy. Any person, firm, or corporation violating this section of this act of Assembly shall be guilty of a misdemeanor, and upon conviction shall be sentenced to pay a fine of not less than fifty dollars ($50.00) and the costs of prosecution.

SEC. 21. *That it shall be unlawful for any unregistered person to have charge of a pharmacy;* and anyone who permits any person, who is not registered or deemed to be a pharmacist or assistant pharmacist under this act, to take charge of a pharmacy, shall be guilty of a misdemeanor and either or both shall, upon conviction, be sentenced to pay a fine of not more than one hundred dollars ($100.00) and costs of prosecution. (Italics ours.)

(c) *No matter who owned the store, it must be registered, and could only be registered if under the supervision of a pharmacist.*

Act of May 26, 1921, P. L. 1172 (West Pa. Statutes, Sec. 9329 a-2).

SEC. 2. Upon application, on a form to be prescribed and furnished it, and the payment of a fee of two dollars ($2.00), the Pennsylvania Board of Pharmacy shall issue *a permit to conduct a pharmacy to such persons, associations, copartnerships, or corporations, as the board deems qualified to conduct such business.* All permits issued under the provisions of this act shall be exposed in a conspicuous place in the pharmacy for which it was issued, and shall expire on the first day of July following the date of issue. *No permit shall be issued unless it appears to the satisfaction of the board that the management of the pharmacy is in the charge of a pharmacist registered under the provisions of the act to which this is a supplement.* All permit fees collected under the provisions of this act shall be paid into the State Treasury. (Italics ours.)

SEC. 3. The Board of Pharmacy may suspend or revoke any permit obtained by false representations made in the application therefor, or *when the pharmacy for which a permit shall have been issued is kept open for the transaction of business without a registered pharmacist in charge thereof, and upon conviction for a second or any subsequent violation of any law of this Commonwealth or of the United States pertaining to the drug business or the sale of intoxicating liquors, or for aiding or abetting in the violation of any such law.* Before any permit is suspended or revoked, the holder thereof shall be given a hearing before the Board of Pharmacy, after

notice of the time and place of such hearing and of the charges made against such holder. At such hearing the accused may be represented by counsel, and shall be entitled to compulsory attendance of witnesses.

Three members of the board shall be a quorum for any such hearing. No permit shall be suspended or revoked except by the vote of three or more members of the board. (Italics ours.)

Thus if a registered pharmacist *owned* two stores, he could not conduct both. If he conducted one, he was compelled to have another registered pharmacist at the other and constantly in charge thereat.

If one not a registered pharmacist *owned* two stores, he could not conduct or take charge of either. He must have a registered pharmacist constantly in charge of each.

How will it help matters to say, as does the Act of 1927, that, though each store must still be in charge of and conducted by a registered pharmacist, the public will be better protected if the owner is a registered pharmacist, though he lives in Europe, and never sees the stores? We still await any logical or reasonable answer.

There are sundry other acts in Pennsylvania which provide that medicines containing narcotics shall be sold only on physicians' prescriptions (Act of July 11, 1917, Sec. 7; P. L. 758); that articles containing wood alcohol shall not be sold (Act of June 17, 1919, Sec. 1; P. L. 1031); that advertisement shall not be

made of articles relating to venereal disease (Act of April 21, 1921, Sec. 1; P. L. 242); that packages of caustic acid and alkalies for household use shall be properly labeled (Act of May 7, 1923, Sec. 1; P. L. 139), etc., etc.

The foregoing acts and regulations have been in effect in Pennsylvania for years before the enactment of the ownership act of May 13, 1927. The latter act is extraneous and without relation to the prior legislation, and can be declared unconstitutional without in any manner affecting the regulations above brought to this Court's attention.

III. The scope of the Act of May 13, 1927.

While the act is called a supplement to the act of May 17, 1917, which was the general act regulating the *practice* of *pharmacy*, establishing a licensing board, and providing for the licensing and registration of pharmacists, etc., yet it does not deal with the *practice* of pharmacy at all.

It deals only with *ownership* of drug stores. It neither repeals, amends or enlarges the comprehensive health regulations of prior legislation.

Let us analyse it: (See the act, pp. 11-13, *supra*).

What the act provides.

1. It forbids any but a registered pharmacist to own a drug store.

2. It forbids any corporation, association, or partnership, to own a drug store *unless all its members* are registered pharmacists.

3. It permits non-pharmacist owners, partnerships and corporations to continue to own what they now own but not to own new stores or stores at new locations.

4. It permits executors or trustees on whom such ownership devolves to own drug stores, though not registered pharmacists, as long as necessary to settle estates.

5. It permits anybody to own "a store" wherein proprietary and household drugs are sold in packages in which they have been put up by *pharmacists*, *manufacturing* pharmacists, *whole-*

sale grocers, or wholesale druggists. This kind of store cannot be called a "drug store."*

6. The penalties are severe,—$100 fine for every day of ownership contrary to the provisions of the act.

* A "drug store" or "pharmacy" is defined by the act of May 17, 1917, P. L. 208, thus:

"The term 'Pharmacy' when not otherwise limited, shall, for all the purposes of this act, be taken to mean a retail drug store or any place where drugs, medicines, or poisons are compounded, dispensed, prepared or sold at retail."

IV. The effect of the act.

1. *The act requires nothing of the pharmacist-owner.* It does not require the individual owner pharmacist to exercise any personal supervision over any of his pharmacies, or to supervise the compounding, preparation or dispensing of drugs, medicines or poisons. So far as its provisions are concerned he may give absolutely no personal attention to any of his pharmacies, and may even absent himself from the country during his entire period of ownership, provided his pharmacies are in charge of registered pharmacist employees as required by earlier legislation.* It contains no requirement that the stockholders, officers or directors, all of whom must hereafter be registered pharmacists, shall themselves engage in the active conduct of any drug store or pharmacy owned by their corporation.

2. The act in no wise regulates the sale of drugs. It is silent on this subject. This matter is already thoroughly regulated by existing law.

3. It does not say who shall compound drugs on physicians' prescriptions. This too is already regulated by existing law.

4. It does not say who shall purchase drugs for sale in the store. The pharmacist owner may employ a manager or clerk to do his buying who is not a

* See the act of May 17, 1917, *supra*, pp. 20-21, 23-24.

registered pharmacist. The standard of strength and purity of drugs and chemicals is already regulated by existing federal and state law.

5. It does not forbid or regulate adulteration or misbranding. This, again, is already covered by existing law.

6. Again, it permits the administrator, executor or trustee of the estate of the deceased owner of a registered pharmacy to continue to own and conduct it during the period for the settlement of the estate. But there is no requirement that such administrator shall be a registered pharmacist. This we contend conclusively establishes that the act is not an exercise of the police power. The Supreme Court of Pennsylvania, by its decision in the case of *Commonwealth* vs. *Zacharias*, 181 Pa. 126 (1897) has declared that such an exception, contained in a somewhat similar act regulating drug stores, was no protection to the public, was rank injustice to individuals, and was an arbitrary discrimination made between those who are equal under the law.

V. It is destructive of appellants' property rights to deprive it of the right to do business in any other cities or at any other locations than those in which it had units on May 13, 1927; and when such destruction is accomplished without any benefit to the public, this is a deprivation of property without due process of law.

A law forbidding the expansion of chain drug stores is not a health regulation, and is not a proper exercise of the police power.

While this *ownership* law is sought to be sustained on the broad ground of police power, the act has not a single attribute of a police regulation.

The Legislature obviously found nothing wrong with the ownership of drug stores by appellant or other corporations, not composed entirely of registered pharmacists. It found no offence nor evil which needed correction. On the contrary, it has expressly declared, by the very act in question, that the ownership of drug stores by such corporations is right and proper *to the extent that they now own such stores.* The business may be carried on by these corporations to any limit whatsoever in the stores they now own—they may supply all the medicines, etc., used in Pennsylvania,—*provided this is done in presently owned stores.* But they may not own any additional units for the transaction of their business.

The legislature has said that appellant's ownership of 28 stores is just, moral and beneficial to the public health of the community. But the ownership of

29 drug stores, it says, will be wrong and criminal. It has found no reason for prohibiting the appellant and other similar corporations, from owning drug stores; it is the *number* of stores they own which it finds wrong.

The *act in question declares proper* the ownership of drug stores by corporations in cities and at points where such stores are now located, but prohibits the same in other cities or at other locations. The ownership of drug stores by appellant in Philadelphia, Chester, York, Lancaster, Reading, Johnstown and Chambersburg is proper and right, but the ownership of a drug store by the appellant in Pottsville or in Hanover is a criminal act. The ownership by appellant of drug stores at 16 of the many hundreds of corners and business locations on the streets of the City of Philadelphia is innocent; but if appellant decides to conduct its retail drug business at 17 locations in Philadelphia, it is a law breaker, punishable by a fine of $100.00 per day for each day's ownership of the additional store.

This demonstrates that it is not the *ownership* of drug stores by corporations that is sought to be prescribed as a health measure, but the increase in the *number* of stores so owned, so that competition from such sources may be checked. Obviously the law is not a health regulation, but a trade regulation aimed at the expansion of a business which operates through a number of branches or units, commonly known as the chain system. This law might well be

entitled, in order to give it the name of the thing which it actually is, "An Act to Prevent the Expansion of Chain Drug Stores."

When, in 1916, appellant became domesticated in Pennsylvania, it entered—and was granted the privilege of doing business—for the purpose of transacting a retail drug business. Appellees admit (R. 67, par. 1) that "the plaintiff (appellant) since March 1, 1916, has been registered and qualified to carry on its business in the State of Pennsylvania, which business was stated in the application for registration to carry on business, to be the *conducting of retail drug stores.*"

Appellant thus acquired the right to carry on this business in one store or a dozen, or a hundred; at one location or many; in one city or town, or in all the cities and towns of the state. ***Appellant's business is a single business,*** although to secure volume, and for the convenience of the purchasing public, it operates through a number of units or branches, and takes its merchandise and its chemist shops to the places where people come to trade.

The right of conducting retail drug stores in Pennsylvania, specifically granted to appellant by the state, is now taken away from and denied to appellant as to all cities and towns, and as to all locations, where it had not stores on May 13, 1927, and as to any number of stores greater than 28.

The tremendous and telling effect of this deprivation,—and the relief to local drug store owners from

competition—will be immediately realized when certain census facts (as to which we assume the court will take judicial notice) are considered.*

The effect of this law upon appellant is therefore to deprive it after May 13, 1927, of great and valuable rights to transact business in Pennsylvania by taking away from it the right to own stores in any city or town where it has not now a branch store, or at any additional location in any place where it has a store.

Both the early and late decisions of this Court, establish that business is property and the right to do business is a property right. **Allgeyer vs. Louisiana, 165 U. S. 578 (1897); Pierce vs. Society, 268 U. S. 510 (1924); Hanover Fire Insurance Co. vs. Harding, 272 U. S. 494 (1926); Frost vs. Railroad Commission, 271 U. S. 583 (1926).**

Throughout this discussion it must be remembered

* The Federal census of 1920 gives Pennsylvania a population of 8,720,000. Therefore appellant, allowed 28 stores, is limited to one store to every 311,000 (approximately) of population. It shows (in addition to the thirteen cities and towns in which appellant has stores) more than 6,000 other cities, towns and villages, including 156 cities of five to one hundred and thirty-seven thousand. Among these are the following:

Allentown,	Shenandoah,	Dickinson City,	Pittston,
New Castle,	Bradford,	Greensburg,	Swissvale,
Homestead,	Charleroi,	Monessen,	West Chester,
Sharon,	Connellsville,	Phoenixville,	McKeesport,
Beaver Falls,	Farrel,	Sunbury,	Hazleton,
Carnegie,	Meadville,	Washington,	Shamokin,
Columbia,	Old Forge,	Harrisburg,	Ambridge,
Duquesne,	Steelton,	Dunmore,	Carlisle,
Mahanoy City,	Warren,	Oil City,	Coatesville,
North Braddock,	Scranton,	Wilkinsburg,	Dubois,
Punxsutawney,	Butler,	Canonsburg,	McKees Rock,
Uniontown,	Nanticoke,	Cheltenham,	New Kensington,
Bethlehem,	Washington,	Donora,	Plymouth,
Braddock,	Bristol,	Jeannette,	Tamaqua,
Lebanon,	Carrick,	Mt. Carmel,	Woodlawn.

The appellant is forbidden to go into any of these places, and is limited to one store in Pittsburgh, a city of 588,000 population.

that appellant complies and has always complied strictly with the laws and regulations of the State of Pennsylvania relating to the operation of drug stores. See the reply affidavit of the Attorney General (R. 54, pars. 4 and 6) and that of the Secretary of the Board of Pharmacy (R. 57, pars. 4 and 6), where it is stated that no act of appellant in violation of any of the provisions of the Public Health Act of Pennsylvania, and no conviction of any violation of the Public Health Act or any other law has come to the attention of the officials of the State in charge of enforcement of such laws. See also appellant's affidavits (R. 40, 46, 47, 52, pars. 3 and 16) where it is shown that each of the stores is under the personal supervision of a registered pharmacist, all prescriptions are filled by registered pharmacists, and that all of its business in Pennsylvania has been carried on in compliance with the public health laws of that state.

It happens to be an economic principle that the retail drug business is one to which the chain store method of distribution is peculiarly applicable, and in which the economies of that system find a ready field of operation. In these economies the public welfare is in every respect benefitted.

On account of the small size of the articles sold in drug stores, making it easy for the customer to carry his purchase, and by reason of the fact that the amount of the average sale is extremely small, making it convenient for the customer to pay out of change which he carries with him, the drug busi-

ness lends itself peculiarly to the cash and carry method of merchandising which constitutes one of the fundamentals of the chain store methods of distribution, and which eliminates the expense of deliveries and charge accounts.

Many of the articles sold in drug stores are commonly advertised articles manufactured at various places throughout the United States. These are purchased in quantity, directly from the manufacturers, without the intervention of jobbers or wholesalers (which has the double effect of saving the middleman's expense and profit and enabling the purchaser to secure the low prices resulting from large purchasing power) and assembled in warehouses for distribution to the retail stores. The central warehouse system, another of the fundamentals in the economics of chain distribution, is thus called forth. Merchandise in carload lots, instead of broken shipments at higher freight rates, is brought into warehouses, located at central distributing points, and thence distributed to local or nearby stores.

The cash basis on which business is done enables the chain store company to pay on a cash basis for its purchases, and thereby secure the discounts given by manufacturers for cash or ten day payments.

The central financial management and auditing system gives these stores the benefit of experienced executive work, and relieves the local store manager from the cares of leasing matters, bookkeeping, financing, bill paying, and a multiplicity of other

details, and enables him to concentrate his time and attention on his store and the service of his customers.

As is well known, the patrons of chain stores are those who are willing to carry their purchases and to pay cash, in order to secure the more moderate prices and increase the purchasing power of their earnings.

The chain stores have in general probably met the economic problems arising since the great war more efficiently than the individual retailer; and the individual retailer has been inclined, in accord with very natural human traits, to lay his failure to keep pace at the door of the chain stores. Under such conditions it is not unnatural that the numerous and not uninfluential individual retailers backed by the jobbers whose business is cut down by direct quantity purchases, should apply to the legislatures for assistance against the less localized, less numerous and politically uninfluential chain store dealers. This has resulted in a flood of legislation against chain stores.

In Maryland a law was enacted limiting the number of mercantile establishments, commonly known as chain stores, operated by any one corporation, in Allegany County, Maryland, to five, and assessing a tax of $500.00 for each store over one and up to five, although the owner of one store was to pay no such tax; and in North Carolina a like license tax was imposed on owners of six stores or more but not on owners of five stores or less.

The Allegany County law was declared unconstitutional in a well considered opinion in the case of **Keystone Grocery and Tea Company vs. William A. Huster, State's Attorney, No. 10,922, In Equity, Circuit Court of Allegany County, Maryland** (not yet officially reported but mimeographed copies of a certified copy of the opinion are submitted with this brief for the Court's convenience); and the North Carolina Tax Law was declared unconstitutional in the case of the **Great Atlantic & Pacific Tea Company vs. Doughton, Commissioner of Revenue in the Superior Court of Wake County, North Carolina** (not yet officially reported).

The following quotations from the opinion in the *Keystone Grocery and Tea Company* case are of interest:

> "It is not shown why the interest of the public, as distinguished from a particular class, requires that chain stores be regulated. The jobber and wholesaler may be interested in some form of regulation or elimination of competition, but the evidence does not show that the public have been damaged by chain stores or their methods of operation, and even if the welfare of the public demanded some form of regulation this Act wholly fails to provide any regulation at all. It is an Act to check and destroy, to eliminate competition in food stuffs rather than to promote competition in the interest of the general public, the consumers."

* * * * * * * *

"So it becomes the duty of the court to determine whether this statute, according to its terms, bears any relation to public order, security, health or morals. What is there in the terms of the Act that bears upon public order, security, health or morals? It does not undertake to regulate the store business. It is not directed against any of the practices alleged to be peculiar to the chain store business and charged to be objectionable. It recites in the title that the object is to limit the number of chain stores and to provide an additional license fee and penalties. Its purpose is not regulation, not correction of abuses and not the prevention of monopoly, but reduction of certain classes of stores (and raising revenue), of any conceivable size, conducted under any conceivable plan, for one organization in Allegany County. It permits the five chain stores to indulge in all the practices said to be objectionable, provided only five are guilty of such alleged offences. All of the five chain stores may be located in the City of Cumberland or of Fitchburg. They may be permitted to monopolize all the retail grocery business of the city to the selfish profit of the owner and without making any charitable contributions to the community. They may undersell and eliminate competitors and send to other places their profits; and yet they are perfectly free to develop into a monopoly if such a thing be possible by underselling their competitors and driving them all out of business."

* * * * * * * *

"Looking at the community as a whole, with the general knowledge of which the court takes judicial recognition, the chain stores, by purchasing direct from the manufacturer and the producer and eliminating the profits and expenses of the wholesaler, jobber and broker and the cost of delivery and selling for cash and thereby escaping the usual losses resulting from sales on credit, are more likely to give to the farmer, truckman and consumer part of the middle man's profit and so to become a blessing to society and the public generally. Indeed, the very elements so earnestly insisted upon by the defendants as a justification for this extra license fee are the very elements that would seem to justify the developments of the chain store."

* * * * * * * *

"Thirty years ago the country had numbers of dry goods and notion stores. These have all been displaced by the department stores in the larger towns, to the great advantage of the consumer, and yet no monopoly has been created. Freedom of trade without interference on the part of the state always develops competition and this will protect the consumer against the danger of monopoly. As the chain stores have developed in numbers, in resources, in capital and in efficiency, they have perhaps become essential for the efficient distribution of merchandise to the general public. Many of them are in the hands of great corporations whose stock is for sale on the stock ex-

changes and the curbs of great cities, and in the hands of a large number of our people who have invested therein their savings and share in their profits. It may be within the power of the Legislature and perhaps within its duty to regulate corporations dealing in the necessities of life, but it certainly is not within its power to single some of them out for destruction until they become a real menace to the public health, morals, order or security. There is nothing in the record that even remotely proves or tends to show that this Act bears any relation either directly or indirectly to the protection of the general public in their health, morals, good order, security or general welfare."

In Kentucky, a few years ago, a law taxing cash and carry stores as such, but not taxing other stores, was declared unconstitutional as class legislation: **City of Danville vs. Quaker Maid, Inc., 211 Ky. 677 (278 S. W. 98) (1926).**

In the drug trade the anti-chain store movement crystallized in the form of the "ownership" law as enacted by the Pennsylvania legislature in the Act of May 13, 1927.

The Maryland law declared unconstitutional in the decision above quoted resembles the Pennsylvania law under attack. But, instead of a limitation to five stores, applicable to all owners, the Pennsylvania law allows as many inequalities as there are chain drug store companies in Pennsylvania, allowing one

to a company having one store and twenty-eight to a company having twenty-eight stores, or 150 to a company having 150 stores on May 13, 1927.

The Pennsylvania law is also aimed more directly at large corporations, all of whose stockholders are not registered pharmacists, since it allows an individual pharmacist or a corporation composed of pharmacists to own a chain of a thousand or more stores and does not permit a corporation, not composed entirely of pharmacists, operating under identical conditions, to own any more stores than it had on May 13, 1927.

There is nothing in relation to the public health which requires that the expansion of chain drug stores be limited. Obviously, if chain stores are injurious to the public health, they should be prohibited altogether. The Legislature has expressly gone on record that such stores are quite innocent and proper, and that there is, so far as the presently owned stores are concerned, nothing detrimental or that needs correction. It is perfectly all right, so says this law, for the customer to procure his Scott's Emulsion, Listerine, vaseline or tooth brush, or to have his prescription filled, at any one of the appellant's 28 stores or the other chain drug stores in Pennsylvania; but, the State argues, it will injure the health of the customer if he procures his articles from a 29th store of appellant or an additional store of some other chain. It is all right for him to purchase from a store of appellant in Philadelphia or Chester but not from a store in Pottsville or Hanover.

The courts should not, it seems to us, place their stamp of approval upon a drastic piece of legislation of this character, making that unlawful which has heretofore always been considered innocent, and depriving persons of rights which they have heretofore possessed, unless there are weighty and substantial reasons showing that such action is necessary for the preservation of the public health.

The mind instantly comprehends, without setting it out in words, that the matter of *title* to the drug store property does not enter into the question of preservation of the public health, nor does the number of stores operated by chain store companies.

The humblest intelligence grasps the fact that the customer who purchases from the 29th store located in Pottsville, or has his prescription filled by the registered pharmacist in that store, has his health safeguarded exactly to the same extent as the customer who purchases from one of the 28 earlier established stores. It is the law regulating the filling of prescriptions and requiring that this shall be done by qualified pharmacists that gives the customer protection, regardless of who owns or does not own the store.

According to the decisions of this Court, the police power does not extend to the point of allowing the state to deprive one of private rights under the guise of a police regulation which has no bearing on the public health or safety.

* * * The courts are not bound by mere forms nor are they to be misled by mere pre-

tenses. They are at liberty—indeed, are under a solemn duty—to look to the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If therefore a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution." **Mugler vs. Kansas, 123 U. S. 623 (1887), at p. 661.**

"* * * To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public, generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations." **Lawton vs. Steele, 152 U. S. 133 (1894), at p. 137.**

And, as Mr. Justice Holmes stated in the case of **Burnes Nat. Bank vs. Duncan, 265 U. S. 17 (1924), at p. 24:**

"* * * The States cannot use their most characteristic powers to reach unconstitutional results. Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, Pullman Co. *v.* Kansas, 216 U. S. 56, Western Union Telegraph Co. *v.* Foster 247 U. S. 105, 114.* * *"

Applying the test laid down in *Lawton* vs. *Steele*, *supra*, the first inquiry is, do the interests of the public, rather than those of a particular class, require interference with the ownership of drug stores by corporations not composed entirely of registered pharmacists? We feel that the answer is obvious.

The second inquiry is, are the means used reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals; or do they arbitrarily interfere with or place unusual or unnecessary restrictions upon private business?

Assuming that the end is the conservation of the public health, it is obvious that the public health is not protected by a requirement that the store where prescriptions are compounded and medicines sold shall belong to a licensed pharmacist, who is not required to do anything with reference to the store except exist as the owner; but that the public health is conserved by the requirement that, regardless of the ownership of the store, the medicines compounded on prescription shall be prepared by a qualified and licensed chemist in pharmaceuticals, and shall be of the proper standard as to strength and quality and not adulterated or misbranded.

It is an unreasonable restriction on private business to require that, in order for a corporation which has always owned drug stores to transact business at a different location, or in a new town, it must compel all its stockholders to become registered pharmacists, regardless of whether or not such stockholders have anything to do with the management of the business, the filling of prescriptions, or the sale of medicines.

VI. The ownership of drug stores by a particular class is not necessary to the preservation of public health; and the natural effect of the act is simply to give a monopoly of the retail drug store to pharmacists. This is not police regulation.

Long ago, the courts of Pennsylvania considered this matter and spoke as follows:

> **Commonwealth vs. Zacharias, 3 Pa. Super. Ct. 264 (1897) (affirmed 181 Pa. 126).**
>
> (P. 274) "The public are in no wise interested in the ownership of a drug store, or in its financial management. They are interested only in having that branch of its management affecting life and health—the sale of drugs, the compounding of prescriptions, etc.,—conducted by a properly qualified person."

This case dealt with the Act of May 24, 1887, as amended by the Act of June 16, 1891, providing that no person should carry on as manager in the state of Pennsylvania any retail drug or chemical store, nor engage in the business of compounding medicines or prescriptions of physicians, or of selling at retail any drugs, chemicals, poisons or medicines without being a registered pharmacist.

Zacharias, who was not a pharmacist, was part owner of three drug stores. He employed in the stores regular registered pharmacists for prescription and supervisory work, and did not himself put up any prescriptions. A conviction of Zacharias

under this statute was set aside on a number of grounds and in the concurring opinion of Judge Smith, the above language is used.

The Statute of 1887, prohibiting any person from managing a drug store except a registered pharmacist, came before the Supreme Court of Pennsylvania in **Commonwealth vs. Johnson, 144 Pa. 377 (1891).** Johnson was the owner of a drug store but was not a registered pharmacist. He employed a registered pharmacist to act as manager of the store. The court held that the "management" spoken of in the statute related to matters actually affecting the public health, and that Johnson was not engaged as manager within the meaning of the act and was not liable to its terms.

These decisions show clearly the recognition by the Supreme Court of Pennsylvania that there is a distinction between regulation of matters which do affect the public health and matters which do not affect the public health.

There is no question that the drug business is subject to proper regulation, but such regulation must actually have an effect upon the drugs themselves as prepared and delivered for use by the consumer, by relating to the quality of the drugs or to the qualifications of those who compound prescriptions, and not affect merely the question of ownership of title to a drug store.

It is quite proper that prescriptions of physicians should be filled by competent pharmacists licensed by

the state, as is provided by the act of May 17, 1917, as amended, and as has long been required, and also that the state should provide for the quality and standard of the drugs, as has been done in the Pure Drugs Act of 1909, as amended. These affect the commodities themselves as delivered to the consumer.

But the health of the consumer is not affected one way or the other by the matter of title to the drugs or the drug store. It makes no difference to the customer whether every stockholder in the Liggett Company, May Drug Company, People's Drug Company or any other company shall be a registered pharmacist or not. What he needs to be assured of is that the person who compounds his prescription regardless of who may be the owner of the store is a licensed chemist in pharmaceuticals. Not one iota of additional protection is furnished by the act in question, for the reason that this law merely grants a naked monopoly of the trade in drug store commodities.

The individual pharmacists have apparently been especially industrious in attempting to gain monopolies in the sale of commodities relating to the drug business. In four states they have sought to obtain the exclusive sale of proprietary medicines, so that the courts have been called upon to pass upon the constitutionality of statutes limiting to licensed pharmacists the sale of proprietary medicines, but not requiring of the pharmacist anything except that he be the person who has such right; just as the Penn-

sylvania law in question confers upon licensed pharmacists the sole right to own drug stores while requiring of the pharmacist nothing whatever except that he be the person who owns the store.

These cases are, **State vs. Donaldson, 41 Minn. 74 (1889); Noel vs. People, 187 Ill. 587 (1900); Saddler vs. People, 188 Ill. 243; 58 N. E. 906 (1900); State of South Dakota vs. P. E. Wood, 215 N. W. 487 (S. Dak.), (1927); State vs. Childs, 257 Pac. 366 (Ariz.) (1927).**

All of the arguments that could be offered for the drug store ownership law were urged in support of these statutes and in all of the cases the arguments were answered and negatived by the courts.

In the **Noel case,** (*supra*), which quotes at length from the Donaldson case, the court says (p. 593):

> "Undoubtedly the legislature has the right, under the police power, to pass enactments for the benefit and promotion of the public health. But it is well settled that the exercise of the police power must be limited to such measures as are designed to promote the public health, the public morals, the public safety, or the public welfare. City of Chicago *v.* Netcher, 183 Ill. 104. When it can be seen from the provisions of a statute that it has no tendency to promote the public health, safety, morals, comfort, or welfare, the courts are authorized to declare it invalid. It is unquestionably true that the state has as much right to regulate the sale of patent

and proprietary medicines and domestic remedies as it has to regulate the sale of any other kinds of medicines and remedies. But these patent and proprietary medicines and remedies are generally put up in sealed packages. In this form they can as well be sold by any person as by a registered pharmacist. The vice of the present pharmacy act is that it gives to the registered pharmacists the exclusive privilege of selling these patent and proprietary medicines and remedies, and excludes all other persons from doing so, while at the same time it makes no requirement of such registered pharmacists that they make any analysis, inspection, or examination of the same. In this regard the act gives to registered pharmacists a monopoly of the business of selling patent medicines, without in any manner protecting the public health. The public health is not protected by limiting these sales to registered pharmacists, who make no examination of what they sell.

"Counsel for the people claim that registered pharmacists are more likely to know the qualities of these patent medicines than other persons who are not registered pharmacists. But registered pharmacists will be as apt as other men to sell such patent medicines as there is a public demand for, when they are relieved of all responsibility for the character of such medicines, and are not required in any way to guarantee their

character, or adaptability to the cures which they claim to effect. * * *

"The views thus expressed are sustained by a decision made by the supreme court of Minnesota in the case of State v. Donaldson, 41 Minn. 74. In that case the supreme court of Minnesota, in commenting upon the provisions of an act similar to the pharmacy act of this state, say: 'The manifest purpose of the act was to protect the public against the mistakes and ignorance of incompetent and unskilled persons in the preparation and sale of drugs and medicines. * * * This is the expressed object of the general provisions of this act. They all look to the protection of the health and lives of the public by restricting the business of preparing and dispensing or selling drugs and medicines to those who have the requisite knowledge and skill on the subject. * * * Now, it is a matter of common knowledge that what are called 'patent' or 'proprietary' medicines are prepared ready for immediate use by the public, put up in packages or bottles labeled with the name, and accompanied with wrappers containing directions for their use, and the conditions for which they are specifics. * * * There is nothing that calls into use any skill or science on the part of the one who sells them. One man can do it just as well as another. * * * The fact that the seller is a pharmacist of itself, furnishes no protection

to the public. * * * Merely to limit their sale to pharmacists would furnish no protection to the public, without some further regulation as to inspection or analysis that would tend to exclude from sale those that might be injurious to health, or something requiring pharmacists to exercise their skill and science in determining the quality and properties of such as they sold. If we turn to our statute, we find an entire absence of any such provisions. * * * Had the act made pharmacists responsible for their quality, this might have had some tendency to protect the public.' After disposing of the suggestion, as being 'too uncertain and attenuated to be entitled to any weight,' that the mere fact of limiting the sale to pharmacists would tend to protect the public, because they would be more likely than others to know the qualities of patent medicines, the court then proceeds as follows: 'In the absence of some other regulations, a statute merely limiting the sale of patent medicines to a particular class would not and could not have any natural or reasonable tendency to protect the public. Such a law would not go far enough to amount to a police regulation. It would be merely giving a certain class of men a monopoly of the trade. This is not within the police power of the state. * * * A law enacted in the exercise of the police power must in fact be a police law. If it be a law for the protection of public health,

it must be a health law having some relation to public health. * * * If it is apparent on the face of the act that its provisions, from their very nature, cannot and will not conduce to any legitimate police purpose, it is the right as well as the duty of the court to pronounce it invalid, as in excess of legislative power, and an arbitrary and unwarranted interference with the right of the citizen to pursue any lawful occupation. According to the construction claimed for it, the provision of the act as to the sale of patent or proprietary medicines would be of just this character. It would be giving pharmacists a monopoly of the business, without in any manner protecting public health.' "

See, also, **Saddler vs. People, (Ill.) 188 Ill. 243 (1900).**

The reasoning of this case is precisely applicable to the situation here and the language might be paraphrased to say that "a statute limiting the ownership of drug stores to a particular class would not and could not have any actual or reasonable tendency to protect the public. Such a law would not go far enough to protect the public. It would be merely giving a certain class of men a monopoly of the trade."

There is every reason why the preparation and sale of medicines and poisons should be limited to competent pharmacists. There is none for limiting the ownership of drug stores to pharmacists. *There*

is no skill or science necessary to the ownership of property; one man can own property as well as another.

The language might further be paraphrased to say that "the vice of the drug store ownership law is that it gives to registered pharmacists the exclusive privilege of owning drug stores or chains of drug stores without requiring them to be in such stores, to supervise the stores, to fill prescriptions in the stores, to purchase the merchandise for the stores, or to do any other act or thing in connection with the stores."

An interesting state case along the lines of the question herein under consideration is **People vs. Ringe, 197 N. Y. 143 (1910),** where the court declared unconstitutional a statute limiting the right to engage in the undertaking business to those who are licensed embalmers. It was apparent that the only matter affecting the public health was the embalming of bodies, and that the public health was protected by requiring that embalming of bodies should be done by licensed embalmers, and that limiting the undertaking business of conducting funerals, management of funeral parlors and furnishing coffins, to licensed embalmers did not tend to protect the public health.

The court says (pp. 149, 151):—

> "A statute passed pursuant to the police power should be reasonable. Its real purpose must be to protect the public health, morals or general welfare. A statute cannot, under the guise of the

police power, but really to affect some purpose not within such power, arbitrarily interfere with a person or a property right. The statute under consideration unnecessarily interferes in several particulars with that liberty of person and property guaranteed by the constitution. * * *

"*We cannot refrain from the thought that the act in question was conceived and promulgated in the interests of those then engaged in the undertaking business and that the relation which the business bears to the general health, morals and welfare of the state had much less influence upon its originators than the prospective monopoly that could be exercised with the aid of its provisions.*

"We sustain the authority of the legislature to pass a statute to license and regulate the business of undertakers to protect the health, morals and general welfare of the state, but hold that the statute in question, so far as considered by us, is an unnecessary and unwarrantable interference with constitutional rights."

This was followed in **People vs. Harrison, 170 N. Y. App. Div. 802 (1915)**, where a like statute with somewhat different phraseology was held unconstitutional, and in the Massachusetts case of **Wyeth vs. Board of Health, 200 Mass., 474 (1909)**, where the court characterized such a statute as unreasonable and violative of fundamental rights.

Counsel for the appellees relied in the Court below upon the case of **Tucker vs. New York State Board of Pharmacy, 217 N. Y. S. 217 (1926),** as sustaining his contention that the Act of 1927 was a reasonable police regulation in the interests of the public health. This case was an application for an order of mandamus against the New York State Board of Pharmacy to direct that Board to transfer the petitioner's certificate to conduct a pharmacy. The petitioner had a registration certificate to conduct a pharmacy at Brooklyn, although he was not a licensed pharmacist. He was dispossessed from this store by certain legal proceedings, and stored the various merchandise from his drug-store for the purpose of removing the same to a new location when he acquired a new drug-store. Three months later he opened a drug-store at Hudson, New York, and removed the stored merchandise to this location.

The Board of Pharmacy refused to transfer his registration certificate to the new store under section 234 of the New York Public Health Law, which section provides:

> "* * * Every pharmacy shall be owned by a licensed pharmacist and every drug store shall be owned by a licensed druggist; and no copartnership shall own a pharmacy unless all the partners are licensed pharmacists and no copartnerships shall own a drug store unless all the partners are licensed druggists; except that any corporation, organized and existing under the laws of the state of New York or of

> any other state of the United States and authorized to do business in the state of New York and empowered by its charter to own and conduct pharmacies or drug stores, and, at the time of the passage of this act, still owns and conducts a registered pharmacy or pharmacies or a registered drug store or drug stores in the state of New York, may continue to own and conduct the same and may establish and own additional pharmacies or drug stores in accordance with the provisions of this article, but any such corporation which shall continue to own at least one of the pharmacies or drug stores theretofore owned by it or ceases to be actively engaged in the practice of pharmacy, shall not be permitted thereafter to own a pharmacy, or a drug store; and except that any person, not a licensed pharmacist or a licensed druggist, who at the time of the passage of the act owns a registered pharmacy or a registered drug store in the state of New York, may continue to own and conduct the same in accordance with the provisions of this article."

The main issue raised was whether or not the petitioner had ceased to be actively engaged in the practice of pharmacy and had therefore forfeited his right to own and conduct a drug store. The Court found that he had not abandoned his drug-store and that the Act permitted the removal of a drug-store from one location to another, the very thing that the petitioner was then doing. Accordingly it entered an order of mandamus.

The Court by way of *obiter dicta* stated that the

petitioner had questioned the constitutionality of the Act; and that "the practice of pharmacy is of such a nature as to permit its regulation by the Legislature. In enacting section 234 of the Public Health Law, I think the Legislature has adopted a reasonable legislation well within its authority under the Constitution." The Court assigned no reasons in support of this statement and obviously confused the practice of pharmacy with the ownership of a pharmacy or drug-store.

It is significant that the New York Act unlike the Pennsylvania Act of 1927 does not prohibit the expansion of chain drug-stores. So long as a corporation owns and conducts a drug-store at the time of the passage of the New York Act, it "may continue to own and conduct the same and *may establish and own additional pharmacies or drug-stores.*" Thus the New York Act fails to eliminate the competition of the chain drug-store; and this in all probability accounts for the more drastic terms of the subsequent Pennsylvania 1927 Act. In fact, the New York provisions are innocuous insofar as corporate drug-stores are concerned since they can expand *ad libitum*.

The New York Act, even more than the Pennsylvania Act, demonstrates that the corporate ownership of drug-stores is not a *malum in se*, which must be wiped out in the interests of the public health. The Pennsylvania Act tolerates corporate ownership insofar as it existed at the passage of the 1927 Act,

whereas the New York Act approves of the continued expansion of corporate ownership of drug-stores.

It is further significant that the New York Act, like the Pennsylvania Act, imposes no affirmative duties upon the pharmacist owner; and hence cannot possibly promote the public health and welfare. It is therefore open to all the objections raised in this brief to the constitutionality of the Pennsylvania Act of 1927.

VII. The Act cannot be sustained as a police regulation because of the lack of logical connection between its alleged object and the means adopted to accomplish that object.

This Court has laid down the principle that in a police regulation there must be a direct connection between the object sought to be accomplished and the means prescribed to accomplish the end: **Burns Baking Company vs. Bryan, 264 U. S. 504 (1924); Weaver vs. Palmer Bros. Co., 270 U. S. 402 (1926); Fairmont Creamery vs. Minnesota, 274 U. S. 1 (1927).** Any less salutary and sound method of admeasurement would do away with constitutional rights in this country.

The following text book statement, epitomizing the principle of the decided cases, may be helpful in fixing the mind upon the requirements of a police statute:

> "*Public good must be the object.* In order that a statute or ordinance may be sustained as an exercise of the police power, the courts must be able to see that the enactment has for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals or general welfare; that there is some clear, real and substantial connection between the assumed purpose of the enactment and the actual provisions thereof, and that the latter do in some plain, appreciable and appropriate manner tend toward the accomplishment of the object for which the power is exercised." **12 Corpus Juris 929, Sec. 441-3.**

It is to be remembered that there is no complaint or charge that chain drug stores or corporately owned drug stores are detrimental to the public health, or that there is any evil to be remedied or condition to be corrected in respect to the ownership of drug stores by appellant or similar corporations whose stockholders are not all registered pharmacists. It is therefore difficult to discuss what object is sought to be accomplished (except the illegal one of eliminating chain store competition for the benefit of individual pharmacist owners, or corporations or partnerships all of whose members are registered pharmacists). Since, however, the act is labeled "a supplement" to a public health law we still assume that its professed object is the conservation of the public health.

There is a distinct hiatus between the assumed object—the preservation of the public health,—and the means prescribed for the accomplishment of the end,—that drug stores shall be owned by registered pharmacists. A law prescribing who shall hold title to a store tends in no wise to conserve the public health.

The Act does not demand that prescriptions be filled by registered pharmacists. This is done by the prior law of Pennsylvania. It does not require that the pharmacist owner supervise the store; that the medicines sold be of any particular standard; or that they shall not be adulterated or misbranded. It contains no requirement as to labeling of the medi-

cines, or with respect to the ingredients of the medicine or prescription. It does not require that the pharmacist owner spend any time in his store, or purchase the medicines or articles sold in the store, or hire pharmacists to compound medicines. It requires nothing whatever of him except that he exist as the owner of the store and that the title to the property shall reside in him. It allows him to spend all his time in Europe and yet own every drug store in Pennsylvania. It allows him to own one hundred stores but prescribes no duty on his part with respect to any of them.

How close the connection must be between the purpose of the regulation, and the means prescribed to accomplish the end, is shown by the cases recently decided by this Court.

In **Burns Baking Company vs. Bryan, 264 U. S. 504 (1924)**, the statute of Nebraska provided that bread should be sold in loaves weighing one-half pound, one pound, or multiples, with a two ounce tolerance. It was claimed that this was for the purpose of preventing imposition by short weight. The State Supreme Court held the regulation reasonable, as tending to prevent short weight, but this Court held that the matter of preventing short weight should have been dealt with directly. This Court said (pp. 513, 517):

> "Undoubtedly, the police power of the state may be exerted to protect purchasers from imposition by sale of short-weight loaves. Schmid-

inger v. Chicago, 226 U. S. 578, 588. Many laws have been passed for that purpose. But a state may not, under the guise of protecting the public, *arbitrarily interfere with private business, or prohibit lawful occupations, or impose unreasonable and unnecessary restrictions upon them.* Lawton v. Steele, 152 U. S. 133, 137, Meyer v. Nebraska, 262 U. S. 390 399. Constitutional protection having been invoked, it is the duty of the Court to determine whether the challenged provision *has reasonable relation to the protection of purchasers of bread against fraud by short weights, and really tends to accomplish the purpose for which it was enacted.* Meyer v. Nebraska, *supra;* Welch v. Swasey, 214 U. S. 91, 105; Dobbins v. Los Angeles, 195 U. S. 223, 236; Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 556; Lawton v. Steele, *supra.*

* * * * * * *

"*Imposition through short weights readily could have been dealt with in a direct and effective way.* For the reasons stated, we conclude that the provision that the average weights shall not exceed the maximums fixed is not necessary for the protection of purchasers against imposition and fraud by short weights, and is not calculated to effectuate that purpose, and that it subjects bakers and sellers of bread to restrictions which are essentially unreasonable and arbitrary, and is therefore repugnant to the 14th Amendment." (Italics ours.)

In the instant case it cannot be shown how the limiting of ownership of drug stores to registered pharmacists will protect the public health.

Only one suggestion has been made along this line, which is found in the opinion of Judge Dickinson who suggests (R. 82) that it *may be* that the legislature *thought* that an individual pharmacist owner *might* purchase drugs with greater regard to quality than to price. Incidentally, reasoning of this sort would authorize the legislatures to put corporations out of the grocery business and out of the clothing business and out of the manufacturing drug business and out of every other business on the ground that the legislature *might* think that individuals *might* give a greater regard to quality than to price.

Is it not an adequate answer to this suggestion that there is nothing in the drug store ownership law which deals with the quality of drugs, or requires the pharmacist owner to give a greater regard to quality than to price? The matter cannot, under the principle of the decided cases, be dealt with in an indirect fashion. And this must be especially true when even the asserted indirect method does not relate to the matter except by a remote speculation based on a double subjunctive raising a conjecture which may as well be false as true. The language of the *Burns Baking Company case* is precisely applicable here.

Imposition through lack of quality of the drugs is already fully provided against in the Pure Drug

Law of 1909, as amended and if still more stringent provisions are needed, the matter could be readily dealt with in a direct and effective way. The provisions that drug stores shall be owned only by registered pharmacists is not necessary for the protection of purchasers against imposition and fraud by lack of quality, and is not calculated to effectuate that purpose. The effect of the act is merely to subject corporate owners to restrictions which are essentially unreasonable and arbitrary and therefore repugnant to the 14th Amendment.

In **Weaver vs. Palmer Bros. Co., 270 U. S. 403 (1926),** a statute of Pennsylvania forbidding the use of shoddy in comfortables was considered. It was claimed that the object of the statute was to prevent the use of *unclean* shoddy. It was shown that sterilization would render shoddy fit for use but the state claimed the right under the police power to prohibit the use of all shoddy, new and old, sterilized and unsterilized, in order to prevent the use of shoddy which might not have been properly sterilized. This Court held this an arbitrary use of the legislative power, saying (p. 415):

> "The constitutional guaranties may not be made to yield to mere convenience. Schlesinger v. Wisconsin, ante, 240. The business here involved is legitimate and useful; and, while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the 14th

Amendment. Adams *v.* Tanner, 244 U. S. 590, 596; Meyer *v.* Nebraska, 262 U. S. 390; Burns Baking Co. *v.* Bryan, 264 U. S. 504."

It will be seen that in the *Weaver case* this Court held the statute must have an immediate connection with the object sought to be accomplished. The state could have prohibited the use of unclean or unsterilized shoddy, but it could not reasonably prohibit the use of all shoddy because this interfered with private rights without directly getting at the evil sought to be suppressed.

What evil is sought to be suppressed by the law under discussion nobody knows, although we suspect that it is competition of more efficient agencies of distribution of drug store commodities; but if there were any evil (which manifestly there is not, since it is nowhere mentioned or specified) it should be specified and prohibited by legislation bearing directly on the suppression of the evil; not by making that criminal which is innocent and thereby depriving individuals and corporations of their business rights, so as to give a monopoly of the business to individual pharmacists. Taking away existing business rights in such a fashion is deprivation of property without due process of law.

A suggestion of the Attorney General on argument was that this law would enable the authorities to deal more effectively with violators of the drug laws; that an employed pharmacist might say, "my superior told me to do this" and the superior, not a registered

pharmacist might say, "I didn't know the law." Counsel for the State seem to lose sight of the fact that this would apply as well to pharmacist owners as to non-pharmacists and also of the fact that neither the ignorance of the law nor the direction of the superior would excuse either employer or employee. For violations of the law the corporate owner, its officers and the violating pharmacist or employee could all be prosecuted; and in addition the drug store license could be taken away from the company and the pharmacist's license could be taken away from the pharmacist under the existing laws of the State.

As to this argument there is no business on earth to which it would not apply and all corporate enterprises, and indeed the transaction of any business whatsoever by principal and agent, would be subject to regulation and prohibition on the same theory.

The State Board of Pharmacy is given full powers to employ chemists, inspectors, agents and attorneys, to investigate and prosecute under the public health and pure drug law (Act of May 8, 1909, P. L. 470, Sec. 5 and 7; Act of May 17, 1917, P. L. 208, Sec. 2 and 11). These agents and inspectors may enter any drug store and take samples that tests may be made to determine whether the drugs conform to standard, or are adulterated or misbranded (Act of May 8, 1909, P. L. 470, Sec. 5); and district attorneys are specifically charged with the duty of promptly instituting prosecutions. If still stronger

laws were needed the legislature could impose penitentiary terms for violations. But any enforcement laws should bear equally upon all the owners, pharmacists and corporations not composed of all pharmacists, and such a matter should not be attempted, and is not attempted, we think, by a law confining the right to own stores to pharmacists.

Appellant and its pharmacist employees have not violated the laws of the State relating to the compounding and sale of drugs, as the appellees themselves admit in their answer and affidavits. But if there were violations by corporate owners or in corporate owned drug stores, they could be as easily dealt with as violations in stores owned by individual pharmacists or corporations or partnerships composed of pharmacists; and if the law was intended to deal with violations then it seems that it should be directed to violations and not to ownership of property.

It has long been established that constitutional rights cannot be made to yield to mere convenience. **Schlesinger vs. Wisconsin, 270 U. S. 230 (1926); Weaver vs. Palmer Bros. Co., 270 U. S. 402 (1926); Adams vs. Tanner, 244 U. S. 590 (1917).**

Reasoning along the line suggested by the Attorney General would justify the taking of property and business rights of perfectly law abiding corporations and individuals against whom there had never been any occasion to enforce any laws.

In **Fairmont Creamery vs. Minnesota, 274 U. S. 1 (1927),** a statute prohibited creameries from paying

more for cream in one locality than in another. The state claimed that this was intended to prevent high bidding by strong buyers for the purpose of destroying competition. This Court inquired as to whether the state might, in order to reach such an evil, inhibit the plaintiff in error from carrying on its business in the usual manner theretofore regarded as both moral and beneficial to the public and reached the conclusion that evils are to be suppressed by legislation dealing directly with the subject matter and comporting with the Constitution and not by such as strikes down essential rights of private property.

This Court says (pp. 9, 10, 11):

> "The real question comes to this. May the state, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse.

"In Adams *v.* Tanner, 244 U. S. 590, 594, this court said: 'Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skilfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.

"Concerning a price-fixing statute, Tyson & Bros. *v.* Banton, 273 U. S. 418, recently declared: 'It is urged that the statutory provision under review may be upheld as an appropriate method of preventing fraud, extortion, collusive arrangements between the management and those engaged in reselling tickets, and the like. That such evils exist in some degree in connection with the theatrical business and its ally, the ticket broker, is undoubtedly true, as it unfortunately is true in respect of the same or similar evils in

other kinds of business. But evils are to be suppressed or prevented by legislation which comports with the Constitution, and not by such as strikes down those essential rights of private property protected by that instrument against undue governmental interference. One vice of the contention is that the statute itself ignores the righteous distinction between guilt and innocence, since it applies wholly irrespective of the existence of fraud, collusion or extortion (if that word can have any legal significance as applied to transactions of the kind here dealt with; Com. *v.* O'Brien, 12 Cush, 84, 90), and fixes the resale price as well where the evils are absent as where they are present. It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrong-doers also may be caught.' And see Adkins *v.* Children's Hospital, 261 U. S. 525; Wolff Co. *v.* Industrial Court, 262 U. S. 522, 537.

"The State also relies upon Otis *v.* Parker, 187 U. S. 606; Purity Extract Co. *v.* Lynch, 226 U. S. 192; Rast *v.* Van Deman & Lewis, 240 U. S. 342; and Merrick *v.* Halsey & Co., 242 U. S. 568. But all those cases recognize the duty of the court to inquire into the real effect of any statute duly challenged because of interference with freedom of contract guaranteed by the 14th

Amendment, and to declare it invalid when without substantial relation to some evil within the power of the State, to suppress, and a clear infringement of private rights."

It will be noted that if the reasoning of the Court below and of the Attorney General were applied to the cases above referred to, the legislature of Nebraska, in order to prevent imposition by short weight, could have prohibited corporations from owning bakeries on the conjecture that individuals might give greater regard to accurate weight than corporations. The legislature of Pennsylvania, in order to prevent the use of unsterilized shoddy, could have prohibited corporations from engaging in the manufacture of comfortables on the theory that individuals might give a greater regard to sterilization than corporations; and the state of Minnesota, in order to prevent strong buyers of cream from paying more in one locality than in another could have prohibited corporations from engaging in the business of purchasing and selling cream on the theory that this would tend to monopoly and individuals might be less likely to do things tending to monopoly than corporations.

Certainly the rule that in legislation which affects business rights there must be a direct, logical and substantial connection between the object sought to be accomplished and the means prescribed to accomplish the end may not be departed from simply because the person whose rights are taken away happens to be a corporation.

VIII. The Act denies to the appellant the equal protection of the law.

It is settled that a corporation is entitled to the benefit of the equal protection clause of the Fourteenth Amendment. It is settled that the amendment is a guarantee of the protection of equal laws.

Of course a state may adjust its legislation to differences in situation but the classification must be reasonable, not arbitrary. It must rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation. **Truax vs. Corrigan, 257 U. S. 312 (1921), Kentucky Finance Corporation vs. Paramount Exchange Corp., 262 U. S. 544 (1923); Atkinson T. & S. F. R. R. vs. Vosburg, 238 U. S. 56 (1915).** Persons circumstanced alike, whether corporations or individuals, must be treated evenly and equally.

The Act of 1927 does not bear equally upon the appellant and upon individual pharmacists or partnerships or corporations composed of pharmacists, operating one or more stores. Under its terms the appellant may own the 28 stores which it had on May 13, 1927, but no more. It may transact its business at the locations which it had on that day, but no others. It may reach with its 28 stores such portions of the 8,700,000 people of Pennsylvania as 28 stores will reach, but it cannot transact its business through 29 or more stores or make its stores available to more people. It may stay in the 13 cities where it is now located, but may not go into a 14th city or to any

other of the more than 6000 cities and towns of Pennsylvania.

An individual pharmacist or a corporation or partnership composed of pharmacists, competing with the appellant's business, may do all of these things, may own a thousand or an unlimited number of stores in Pennsylvania; it may go on every block in Philadelphia, and upon every street in every city in the state; may seek to reach with drug stores all of the population.

The appellant cannot do a volume of business in Pennsylvania larger than can be done in 28 stores. The individual pharmacist owner or the partnership or corporation composed of pharmacists, competing with appellant may do all the business that a hundred or a thousand stores can do.

The equal protection of the laws—the protection of equal laws—is taken away from the appellant by the act.

An illustration of the inequality and injustice of the act is the following. The average drug store employs, say two pharmacists, and has from 6 to 20 other employees. Under the act the other employees, those who handle proprietary medicine, hospital goods, candy, cigars and soda water, the bookkeepers and other help in the store, may not own a part interest, as partner or stockholder in the business, to the success of which their efforts contribute, nor may a registered pharmacist engage in the business with the cigar manager and soda manager as partners, or co-stockholders.

The pharmacist owner may hold shares of stock or an interest in railroads, though not licensed to operate engines; in ships, though not a licensed pilot or master seaman; in taxicab companies, though not a licensed chauffeur; and in all other instrumentalities of production, manufacture and distribution. He alone may also hold shares in drug stores and drug companies. No other member of the public has such a right.

This law bears with cruel inequality upon a corporation situated as the appellant is, which necessarily cannot require that all persons who at any time may be owners of its capital stock shall be registered pharmacists. For a partnership or corporation composed of registered pharmacists, in competition with appellant, may have all the benefits of the chain store system (which reduces its overhead expense as the number of stores is raised and the volume of business increased), and may operate stores exactly as the Liggett Company operates its stores, employing for the preparation of medicines in the prescription departments licensed pharmacists, exactly as does the Liggett Company; may have a store in every one of the cities, towns and villages of Pennsylvania; may open a store at any desirable location on any street in any city or town; while the Liggett Company is restricted to the towns and locations where it now has stores and to the volume of business which it can get in its present stores.

There is no distinction whatsoever as to the methods

of operation or otherwise, between a chain of drug stores owned by a pharmacist, or a partnership or corporation composed of pharmacists, and one owned by a corporation, the holders of whose capital stock are not all registered pharmacists, yet the right to own such stores and chains of stores, unlimited as to number, community or location, is granted to the former and denied to the latter. This is not the equality guaranteed by the Federal Constitution; for it does not meet that standard of evenness and fairness with which the laws of the state should bear upon all within its jurisdiction, according to the just principle of the constitution, as interpreted by this Court, that all are entitled to the protection of equal laws.

IX. The ownership of property is not a profession. The practice of pharmacy is not, properly speaking, a profession, but if it is, that fact does not justify depriving corporations of business and property rights merely because a certificate of competency is required of the corporation's employee pharmacists.

The retail drug business, as its very term imports, *is a mercantile business,* dealing in commodities of common use and necessity, with a manufacturing aspect in one particular, namely, that certain medicines are prepared in a chemist's shop on the premises, from specific formulae set forth in writing in prescriptions of physicians.

Such medicine is made up, packaged, labeled and sold on individual order, and in this way only does it differ from proprietary medicines or common household drugs, which are made up in quantity, from a general formula, and packaged and labeled at an establishment away from the drug store. For instance, a doctor might (as they formerly did) write a prescription for twelve tablets of five grains each of monoacidester of acetyl salicylic acid, with directions for taking for a cold, or to reduce temperature. The pharmacist would make up the same product which is now sold in already prepared form as "aspirin," but the cost to the patient would be higher, and he could not get it as quickly. Nowadays the physician would simply tell the patient, nurse or mother to get a package of five grain aspirin

tablets, with instructions as to how often they should be taken.

There would seem to be no more reason to limit the ownership of drug stores to the chemist working in the drug store than to the chemist working in the manufacturing laboratory.

The pharmacist's relation to the retail drug store is that of manufacturing chemist when filling prescriptions, and salesman when selling the manufactured article, or other drugs or articles, to the customer.

The Attorney General, however, propounds the theory that the practice of pharmacy *is a profession,* which may be limited to one who qualifies himself. There is no doubt that the state can require the person who compounds medicines to have the proper chemical knowledge and training and to demonstrate this by securing a certificate of competency, and becoming registered or licensed, and the state may make it unlawful for unqualified persons to do this work, thereby confining the compounding of prescriptions to licensed pharmacists. This exclusive privilege the pharmacist undoubtedly has and is entitled to.

Whether a pharmacist is a professional man or not is aside from the question, although he is not generally so understood to be, this term being usually limited, in common understanding, to the doctor, lawyer or minister, and other like callings embracing a wide degree of cultural knowledge, and the exercise of which involves personal discretion and judgment,

rather than mechanical knowledge of how to put together certain chemicals. The mere fact of being licensed does not make of a calling a profession, else this would make professional men of chauffeurs and all who drive automobiles, aviators, railroad engineers, masters, mates and engineers of vessels, men who run stationary engines and boilers, and numerous others who follow occupations where incompetency in handling dangerous instrumentalities would jeopardize the safety of the public, and as to which proficiency must be demonstrated by the securing of a license.

The argument of the Attorney General then proceeds that since the exclusive privilege of *filling prescriptions* is given to pharmacists, the state may go on and give the exclusive privilege of *owning drug stores* to pharmacists. In other words, the Attorney General argues that because pharmacy has some aspects of a profession in that certain knowledge and experience is required to compound chemicals, the ownership of drug stores is a profession. Of course it is clear that whether pharmacy is or is not a profession, the *ownership* of drug stores or any other species of property certainly is not a profession. The argument is an egregious *non-sequitur*.

As suggested by the court in the **Zacharias case** (*supra*, pp. 31, 47), there are many matters of ownership and management of a drug store in which the public has not the slightest concern. There are matters of leasing property, negotiating with landlords, banking, borrowing and paying money, paying bills, paying employees, keeping books, buying fixtures and equip-

ment, advertising window displays and innumerable other details of executive and financial management. It is not necessary that a pharmacist shall handle these details; it is only necessary that a pharmacist shall prepare and dispense physicians' prescriptions and supervise that part of the business which relates to special medicinal preparations not already packaged and ready for sale. To be a pharmacist requires only the knowledge of pharmaceuticals and their combination into medicines; to engage in the business of owning drug stores and selling drugs and drug store merchandise requires other things.

The State attempts to draw an analogy between the practice of law and medicine and the ownership by pharmacists of drug stores. In the case of both doctor and lawyer a personal relation is involved, a personal service is rendered and paid for. The case of a pharmacist filling a prescription is entirely different. The customer brings to the store a prescription written by a physician calling for certain chemicals to be compounded into a formula as ordered by the doctor. There is no personal examination by the pharmacist of the condition or symptoms of the patient, no inquiry into his affairs. The pharmacist and customer need never see each other. The prescription could be transmitted through a third person, or by mail. The pharmacist is merely to go through the mechanical detail of weighing or measuring the proper amounts of the medicines or drugs, compound them chemically as ordered, place them in a receptacle,

transcribe to the label the directions for taking as ordered by the physician, fix a price for the merchandise so manufactured and give or send it to the customer, collecting a price for the article so manufactured. If the prescription is perfectly filled, the function is mechanical and ministerial, involving no discretion.

There are hundreds of other businesses in which especially trained persons are required to conduct some of the details. A ship's engineer, a ship's pilot and a ship's captain must be specially trained and licensed; yet there is no reason why the owner of a steamship or stockholders in a steamship line should be pilots, engineers or navigators.

A taxicab or automobile must be driven by a licensed chauffeur yet there is no reason why the ownership of a taxicab company or an automobile should be limited to licensed chauffeurs. Similar instances might be multiplied without number.

As a concomitant to this "profession" theory, the State argues that the act, by its last exception, only affects a small portion of the drug store business, that is to say, the prescription department.

The language of the exception is:

> "Provided that nothing in this section shall be construed to affect the ownership by other than a registered pharmacist of a store or store wherein the *sale* or *manufacture* of medicines is limited to proprietary medicines and commonly used household drugs. Provided such commonly used household drugs are offered for sale to con-

sumers in packages which have been put up by pharmacists, manufacturing pharmacists, wholesale grocers or wholesale druggists." (Italics ours.)

According to this, one may have a store in which pharmacists (or even a wholesale grocer or wholesale druggist) may manufacture and put up in packages, commonly used household drugs. But one may not have the pharmacist who puts up the commonly used household drugs also put up medicines on physicians' prescriptions. The pharmacist is not practicing a profession if he makes up aromatic spirits of ammonia, castor oil, or bicarbonate of soda on the direction of the store owner, or customer, but he is practicing a profession if he does so on the written direction of a physician!

There are many medicinal preparations, neither commonly used household goods nor proprietaries, sold on call and not on prescription, including practically all newly developed preparations, which could not be sold except by pharmacists until they became commonly used or proprietaries were developed from them.

The theory that the law is valid under the police power because only a small portion of the business is affected is put forward by the state, to the extent of carrying it in its answer (R. 71, par. 32) and its affidavit (R. 55, par. 10), where it is stated that the only portion of appellant's business affected by the act is the prescription business amounting to only

5% of the total volume of business. We do not understand that because a law may cut off only part of a man's rights it thereby becomes constitutional.

The appellant's prescription business in Pennsylvania in 1927 (as shown by the affidavit of John S. Alley, R. 63) amounted to $163,487.40 or approximately .064% of the business. But according to Mr. Alley's affidavit, and it is the only testimony on the subject and is undisputed, and according to common knowledge and experience, the prescription business constitutes a vital part of the conduct of a drug store, and a great deal more of the volume of business than the prescription business would be cut away by eliminating the prescription department.

The undisputed testimony shows that purchasers who go to drug stores for prescriptions, purchase many other articles of hospital, sick room and household use; that any attempt to conduct a store which is not in the true sense a drug store, in that it makes up and sells prescriptions, will necessarily result in a very large decrease of the business of such store; and that a drug store, as the same is commonly understood in practice in the United States today, is a place where the members of the public purchase prescriptions and medicines, and also other articles commonly carried in drug stores for sale (R. 63).

The appellant has always conducted drug stores with prescription departments and has no machinery for operating stores without prescription departments.

It employs more than 1200 pharmacists and assistant pharmacists, from whom are developed its store managers. Its purchase of medicines, chemicals and drug store articles is tied up with the purchase of articles and materials which go to the prescription department. For twenty years it has been operating its stores with a system built around the prescription, hospital and medicine department. Its entire system would have to be rebuilt and it would be pushed out of the drug business and into something which is not the conducting of retail drug stores if deprived of the right to have prescriptions filled in its stores; such filling of prescriptions being merely the manufacture of the medicine by hand in a chemist's shop at the back of the store. Its loss of prestige and custom would be incalculable if its stores could not function as drug stores and with prescription departments, supplying all of the articles which drug store customers normally require.

Stores without prescription departments could not be called drug stores under Section 15 of the Act of May 17, 1917, providing that it shall be unlawful for any person, firm or corporation to conduct or transact business under a name which contains as part thereof the words "drug store," "pharmacy," "medicine store," "medicine shop" or "drug shop," or in any manner by advertisement, circular, poster, sign, or otherwise describe or refer to the place of business by the terms, "drug store" or "pharmacy" or any other term having a similar meaning, unless the place of business is a drug store or pharmacy,

duly registered and authorized by the State Board of Pharmacy. No drug store could be registered under the Drug Store Ownership Law unless it were owned by a pharmacist; therefore no matter how much proprietary medicines and other articles commonly carried in drug stores might be sold without a prescription, the place of business could not be called a drug store or medicine store. The appellant corporation has always used the name "Liggett's Drug Store" and would lose an immensely valuable portion of its good will by being deprived of the use of such name. Moreover, it is common knowledge that the customer at the prescription counter is a customer for other departments of the store, especially allied ones like the medicine or hospital department.

The prescription business done by the average pharmacist owner in each store is about the same as that done by the Liggett Company, namely around 6%, the rest of his business being in proprietary medicines and other articles. But the establishment is not a drug store under the law or in fact unless it has a prescription department; and this is a business in which the Liggett Company is engaged, for which it was chartered, and for which it is authorized in the State of Pennsylvania. The individual pharmacist competitors of the Liggett Company have prescription departments although the average of them do no more prescription business, in proportion to their other business, than the Liggett

Company; and there is no reason why they should be able to own drug stores and operate them through pharmacists than there is that the Liggett Company should do precisely the same thing.

Of course, it is obvious that limiting the ownership of drug stores to pharmacists only when there is a prescription department in the store no more tends to conserve the public health than the limitation to pharmacists of the ownership of any other kind of store, and the exception does not save the law from the hiatus that exists between the ownership of a drug business and the preservation of the public health. There is still nothing that requires the pharmacist owner to fill prescriptions, or have prescriptions filled by a pharmacist, buy good drugs, or himself purchase any drugs, or give any attention to the store.

It is to be remembered that the state finds nothing wrong with the ownership of drug stores, with prescription departments, to the number that such stores were owned on May 13, 1927.

It cannot be said that the health of a part of the people of Philadelphia will be jeopardized by going to a new Liggett store for their prescriptions and medical needs, to the extent that it is necessary to forbid the ownership of such a store, but that the health of the other part of the commodity who go to the presently established stores is not so jeopardized.

These two things are inconsistent and show that

no necessity exists for limiting the ownership of drug stores to pharmacists, and consequently such a measure is not a police measure.

Who is benefitted by a law limiting the ownership of drug stores containing prescription departments to pharmacists? Not the customer, for he cares not who owns the store, and is not interested in that phase of the matter, so long as his medicine is compounded by a competent pharmacist, owner or employee. Not the pharmacist who wants to work for a corporation owning a store and does not wish himself to take on the duties or responsibilities of proprietor. Not the other drug store employees, who are prohibited from ever owning any interest in the business they work for. Not the investor who is prohibited from putting his earnings into a drug store company unless he qualifies as a pharmacist.

There is only one person who receives such benefit,—the present pharmacist owner and corporation composed of pharmacists owning a drug store or stores, who is freed of competition by chain drug companies not composed solely of pharmacists at all places where they had no locations on May 13, 1927.

X. Errors in the opinion of the Court below.

Some space must be given to a discussion of the opinion of Judge Dickinson which, as will be noted, is lamentably replete with errors and misconceptions.

(*a*) A misleading statement occurs at the very outset of the opinion where, after saying that the Pennsylvania Legislature has passed a series of acts having a more or less direct bearing on this litigation, Judge Dickinson continues:

> "The beginning may be said to be the Act of May 17, 1917." (R. 78.)

This might lead one to think that only since 1917 has the state had laws regulating the sale of drugs. This would imply that it was only because of lack of regulation that corporations and persons other than pharmacists were allowed to engage in the retail drug business.

As shown by **Commonwealth vs. Johnson (supra)**, the state, since May 24, 1887, provided by law that pharmacists, in order to compound and dispense medicines, shall obtain a certificate of competency from the State Pharmaceutical Examining Board and shall be registered; and that no person shall compound medicines or prescriptions of physicians except a registered pharmacist.

With this safeguard as to only that portion of the general miscellaneous business of drug stores which has a bearing on the preparation of the drugs, it has long been recognized that the business may be owned and conducted by corporations and individuals

not pharmacists, with no detriment, but to the distinct benefit of the community. Accordingly appellant and other corporations, both foreign and domestic, have long been freely granted the right to engage in the retail drug business and own drug stores.

The act of May 26, 1921, P. L. 1172 expressly provides for the granting of registration of drug stores to corporations, and all of the acts are applicable to "persons, firms and corporations."

The act of 1887 was amended on June 16, 1891, as shown by the case of **Commonwealth vs. Zacharias, 3 Pa. Super. Ct. 264 (181 Pa. 126)**, and has been revised and amended from time to time; and the Act of May 26, 1917, is simply a revision of general regulations which have been in effect for forty years or more.

In addition to this, the Pure Drug Law of Pennsylvania (*supra*, p. 17) providing that drugs shall not be adulterated or misbranded and shall be of U. S. Pharmacopoeia standard as to strength and quality, was adopted in 1909. This Act is one which is amended from time to time so as to provide that the latest revision of the U. S. Pharmacopoeia shall be the official pharmacopoeia. The last amendment is in 1927 (*supra*, p. 19) and provides that the *tenth* revision shall be the official pharmacopoeia.

The beginning, therefore, is not in 1917, as Judge Dickinson indicates. Decades before that, the state had laws and regulations to protect the public health,

under which drug stores have been permitted to be owned, in whole or in part, by others than registered pharmacists, or corporations or partnerships wholly composed of pharmacists, and such ownership has not been found to affect the public health in any way.

The Act under attack, although labelled a part of the Public Health Law, is an unrelated piece of legislation having to do with the ownership of property, and not in any way regulating drugs or the conduct of drug stores.

(*b*) One of the most serious of Judge Dickinson's apparent miscomprehensions is found on page 81 of the Record.

After going into the matter of jurisdiction and finding that the court has jurisdiction, he says:

> "This takes us back to the question of whether we are prepared to find that the public has no concern in the business of a drug store or the calling of a pharmacist."

This is not the question involved in this case at all. It is conceded that the drug business is one which has long been recognized as subject to regulation and there is no doubt that the public is concerned in the business of a drug store and in the calling of a pharmacist *so far as the same relate to those matters that are connected with the conservation of the public health.*

In the case of **State v. P. E. Wood, 215 N. W. (So. Dak.) 487 (1927),** (quoted from more fully hereafter)

which declared unconstitutional a statute giving the sole right to registered pharmacists to sell proprietary medicines, the court says (p. 488):

> "* * * And it is not a particularly modern view that the public is entitled to protection in health against fraud, misbranding of goods and the unregulated sale of dangerous and poisonous medicines. This principle is old and it is well established that the state may protect the public by wholesome and effective laws. No argument is necessary to induce this court to uphold any valid exercise of the police power of the state, so protecting the public.
>
> "The vital question is, will this act accomplish what is claimed for it? Both the briefs of appellant and of the Amicus Curiae seem to assume that restricting the sale of such medicines to registered pharmacists will protect the public from all the ills that might result from unrestricted sale. But they do not point out how the public are protected."

In State vs. Childs, 257 Pac. (Ariz.) 366 (1927), also declaring unconstitutional a statute seeking to limit the sale of proprietary medicines to pharmacists, the court says (370):

> "We do not wish it to be understood that we hold the power of the Legislature to legislate in regard to the sale of drugs, medicines or poisons is denied. On the contrary, we think all reasonable provisions protecting the health and safety of the public by regulating the prescribing, compounding and dispensing of such articles are highly commendable and should be

> encouraged, but when an attempted regulation on its face apparently has no effect except to grant a monopoly of the sale of certain articles to a special class under conditions which can in no manner benefit the public, such regulation cannot be sustained."

The principle that Judge Dickinson overlooks is that laid down in the case of **Michigan Public Utilities vs. Duke, 266 U. S. 570 (1925),** as well as the cases hereinabove cited, where it is held that, although a business may be within the regulatory power of the state, requirements which have no relation to the public welfare, and which would deprive a person of his business rights, cannot be sustained under the police power.

(*c*) Judge Dickinson goes on to say that in what are called the rural districts, the local pharmacist or druggist "serves many of his customers and patrons as their physician." In making such a statement Judge Dickinson seems to overlook completely—or not to realize at all—that if a pharmacist, in the rural districts or elsewhere, "serves customers and patrons as a physician" he does so in absolute violation of the laws of the state of Pennsylvania. The medical licensure act (*supra*, pp. 15-16) provides that no one except a doctor, educated, trained and licensed as such, shall act as a physician; and the registered pharmacist has no right to prescribe any medicines. His functions have to do only with the *compounding of medicines.*

After saying that the local pharmacist or druggist serves many of his customers as their physician, Judge Dickinson adds, with reference to this practice, "so general was it that the *physician* of the neighborhood was likewise the *druggist.*" (Italics ours.) Of course, although the physician was likewise a druggist he nevertheless had the right to treat his customers as a physician; and if he was also a pharmacist he had the right to fill prescriptions. It is an anomaly of the law under discussion that the physician, who prescribes the medicine, may not be the owner of a drug store or have an interest therein. That monopoly is reserved for the pharmacist, to the exclusion even of the doctor, the fountain head of the guardianship of the public health.

It seems evident that Judge Dickinson has confused the functions of druggist and physician "in the rural districts." There used to be plenty of rural districts which had no drug stores, but practically every community had access to a doctor, who carried medicines with him because of the distance to a drug store.

(*d*) Judge Dickinson goes on to say:

> "It is said that a relatively small part of the business of a drug store is the compounding of medicines and the filling of prescriptions. This is true." (R. 81.)

It is certainly true that only about 6% of the business of a drug store, whether owned by a registered pharmacist or by anyone else, is in the pre-

scription department. But this department is the heart of the whole business, is connected with the medicine and hospital departments and it is vitally necessary to that business that it have a prescription department. This is the uncontradicted evidence in the case (R. 63).

This statement of Judge Dickinson's may be an echo of the State's argument that the relatively small extent of the deprivation justifies it under the police power, which has been discussed above. It being true that a relatively small part of the business is that of filling prescriptions, the question suggests itself, why give a monopoly of the entire drug store business to the filler of prescriptions when he is concerned with only a relatively small part of the business?

(c) Judge Dickinson goes on with the following statement:

> "There is a type of drug store known as cut-rate which, perhaps, has no prescription counter at all and scarcely ever more than a nominal one. * * *" (R. 81).

It is difficult to divine the relevancy of this pronouncement.

If the Judge's remarks are directed solely to stores which have no prescription department, they fail of application to appellant, for it has prescription departments and is fighting to maintain them. If it wished merely to sell proprietary medicines, and

commonly used household drugs, it need not comply with the act of 1927 at all. It might then fall into the "cut rate" class described by the Judge. But how, in the name of reason, could its doing so, improve the public health?

We suspect, though the Judge does not say it, that what was in his mind, when he wrote the above, was this: that perhaps the legislature thought "cut rate" drug stores were more largely conducted by corporations than by registered pharmacists and that to put corporations out of the drug business would stop rate cutting. But (1) this ignores the fact that the law permits all existing corporate drug stores to continue in business; (2) it *assumes*, wholly without evidence or foundation in common experience that a corporate or non-pharmacist owner will be more likely to cut rates than a registered pharmacist or a corporation whose stock is wholly owned by such; and (3) finally it assumes it is bad for public health that, in the press of competition, some drug store shall sell a bottle of Vick's salve or of Listerine for one cent less than the other stores in town.

If "cut rate" stores, or stores without prescription departments are bad for the public, a very harmful thing is done by the Act of May 13, 1927, since it expressly authorizes the establishment of such stores without limitation and by whomsoever owned, while limiting prescription stores, so far as owned by corporations, all of whose stockholders are not pharmacists, to those now established.

(*f*) Judge Dickinson then continues (R. 81):

> "* * * * and medicines and remedies sold are so-called proprietary medicines. They are, none the less, as truly 'prescribed' by the druggist as are 'filled prescriptions' and are just as much taken upon the faith and confidence of the user in the drugs as is the medicine prescribed by a physician."

This evidences a complete misunderstanding of the situation by the learned Judge.

Not only has a pharmacist no right to "prescribe" proprietary or any other medicines, but in selling Scott's Emulsion, Cascarets, Listerine, Castoria, Vaseline, Pepsodent tooth paste and hundreds of like articles the pharmacist, or medicine clerk, for it does not require a pharmacist to sell such articles, is simply a salesman or merchant, and nothing more. Such medicines are sold by the drug store on call by the customer. It is not a part of the duties of a pharmacist to know the qualities or the efficacy of proprietary medicines nor is he held to any responsibility therefor under the drug store ownership law or the public health act. The seller is a retailer, not a physician. State *vs.* Donaldson, State *vs.* Wood, State *vs.* Childs, *supra.*

Judge Dickinson again simply confuses the functions of a physician and those of a pharmacist. The reasoning of the court in the Noel case, *supra,* and in the Wood case, *supra,* is precisely applicable to the suggestions made by Judge Dickinson and answers them fully.

(*g*) Judge Dickinson goes on to say *in words* (R. 82):

> "We, of course, recognize the force of the argument addressed to us based on the distinction between a law which forbade any one other than a skilled pharmacist to compound medicines and another law which forbids anyone other than pharmacists to have a share in the ownership of the business of a drug store."

But his decision does not show such distinction actually penetrated his consciousness in relation to the constitutionality of this so-called police regulation.

A law which interferes with individual rights, and assumes the right of interference, must directly and logically serve the public interest. The law which requires that the person who fills prescriptions must be a chemist trained in pharmaceuticals, and so registered, does serve such interest; but the law which says that such chemist must be the owner of the business serves only the interest of the pharmacist who is able to buy a drug store.

The Judge in a single phrase brushes aside the very distinction he has recognized, when he adds (R. 82):

> "Even here, however, we are unable to say that there is not a substantial relation of ownership to the public interests."

By this phrase he brushes aside all the principles and decisions we cited from this and other courts.

In effect, this is all the light he gives us on the *ratio* of his decision.

Judge Dickinson does attempt to trace a relation between ownership of the store, and the public health, by saying that the medicines must be in the store before they can be dispensed and that what is there is dictated, not by the pharmacist who hands it out to the customers, but by those who have a financial control of the business. A pharmacist owner is as much interested in the financial end of the business as any other owner and there is nothing in the drug store ownership law which places any responsibility on him or makes any requirement of him as to what is to be in the stores, or as to its quality. **Noel vs. People, State vs. Donaldson, State vs. Woods, State vs. Childs, supra.**

As suggested by the court in the *Noel case,* what is in the store is likely to be dictated by public demand rather than anything else; and the pharmacist owner is going to sell what the public requires.

(*h*) Judge Dickinson then adds this remarkable sentence (R. 82):

> "It *may be* the Legislature *thought* that a corporate owner, in purchasing drugs, *might* give a greater regard to the price than to the quality." (Italics ours.)

There is nothing in the drug store ownership law under attack which requires the pharmacist owner to give a greater regard to quality than to price. Under that law the pharmacist is perfectly free to

give a greater regard to price than to quality. If the legislature thought other classes would give a still greater regard to quality than to price, the legislature could, under Judge Dickinson's conjecture, give the exclusive right to own drug stores to doctors, lawyers, clergymen, social welfare workers or philanthropists.

Judge Dickinson does not pretend that the pharmacist owner is required to give any greater regard to quality than to price but simply says that the legislature, perhaps, *thought* the pharmacist *might* give such greater regard. If it was the purpose of the legislature to raise the quality of articles sold in drug stores, then it could, by direct legislation to that effect, have made a law which would bear on the quality of such articles. As a matter of actual fact, the question of quality and standard of drugs is dealt with in the Pure Drug Act and all persons, firms and corporations who manufacture and sell drugs and who own drug stores are amenable to its provisions. There is not a thing in the drug store ownership law which deals with the matter of quality of drugs.

But Judge Dickinson would take away the right of corporations to deal in the retail drug business by a conjecture on a subject on which he had no evidence, and as to which the plain facts are, and by statutory mandate must be, quite to the contrary.

All of the arguments made by Judge Dickinson and by the State were raised in the **Wood case** (*supra*)

in South Dakota and the court answers them conclusively. Briefs were there filed on behalf of the State Board of Pharmacy and the South Dakota Pharmaceutical Association setting up all the reasons they could think of for sustaining the law limiting the sale of proprietary medicines to pharmacists. Speaking of the brief of counsel for these associations, the court says **(215 N. W. 487, at p. 489):**

> "He points out that the provisions of the Pure Food and Drug Law prohibiting written misbranding have been sustained and says the statute in question is intended to prevent verbal misbranding. He points out that many patent medicines contain dangerous and poisonous ingredients and asks whether a purchaser should be sold a dangerous drug simply because he asks for it. He says it is necessary for the protection of the public health and to protect the public against fraud that the goods be handled by some one who understands their properties and says that the modern view and tendency is to recognize that the public are entitled to protection. * * *
>
> "It is suggested that a pharmacist, to obtain his license must be of good moral character and that would protect the public from verbal misbranding, fraud and dangerous medicines, but why restrict the sale to pharmacists only when there are many other men of good moral character? If moral character is a sufficient guarantee, the statute might require vendors to be men of good moral character, but there can be no reason for requiring them to be druggists.
>
> * * * * * * *

"Appellant suggests that the ethics of the profession would be a protection to the public health; that a pharmacist having knowledge of the harmful effect of certain drugs would voluntarily warn the public, where others would not know or care so long as a profit on a sale could be made. Perhaps knowledge might be some protection, but where the legislature has not seen fit to require that the composition and effect of such medicines be known and such knowledge used in the protection of the public health the possible benefits that may result from the knowledge are conjectural and cannot receive much consideration. It would seem to be an unreasonable exercise of the police power to limit sales to the profession without requiring anything of the profession to safeguard the public health. • • •

"We find nothing which requires druggists to warn the public against any danger in their use, or to assume any responsibility in their sale, or to do anything to protect the public in return for entrusting to them the sale of such medicines. Nor have any regulations of the Board of Pharmacy requiring anything of the druggists been called to our attention, which can be said to even tend to added security of the public in buying such medicines of druggists. If a druggist does know the ingredients he is not required to use such knowledge and need not be of any assistance; if he does not know them he cannot be of any assistance.

"Appellant says there are statutes forbidding the sale of habit-forming drugs • • •

> against the use and sale of wood and methyl alcohol * * * against the sale of adulterated and misbranded drugs * * * against the sale of pharmaceutical poisons * * * and against the sale of intoxicating liquor. But all these statutes apply with equal or greater force to laymen, subjecting them to the same penalties and liabilities. We are unable to see wherein restricting to pharmacists the unlimited and unregulated sale of patent and proprietary medicines tends to protect the public health."

Judge Dickinson goes on to talk about the liquor legislation without the slightest relevancy to this issue. The liquor legislation and its final prohibition grew out of the fact that the use and consumption of liquor for beverage purposes was regarded as a menace, and the fact that the saloon had become a nuisance. This was true of the saloons and of liquor selling whoever owned saloons.

Judge Dickinson utterly fails to point out and the evidence utterly fails to show any nuisance, any menace, any threat to the health of the public through drug stores being owned by others than pharmacists, when a registered pharmacist must, under the law, be in charge of the store and none other than a registered pharmacist may compound prescriptions. But to make any applicable analogy Judge Dickinson would have to say that he would have sustained an act—had there ever been such—which limited the ownership of saloons to barkeepers and would have barred such reputable corporations as Park &

Tilford from selling wines and liquors. Or he would have to say that it would serve the public interest if all hotel corporations were forbidden to own and operate a bar, unless all its stockholders were barkeepers.

(*c*) Judge Dickinson goes on to speak of the separation between ownership and management. He seems completely to forget that there is nothing in the drug store ownership law requiring the owner pharmacist to manage the store or to have anything to do with it. He may own it, and let anybody else in the world manage it. In the absence of any of the requirements that the owner pharmacist shall do anything with reference to the store, the possible benefits resulting from combination of ownership and management, if there are any such,—which is a practical proposition we deny,—are purely conjectural and cannot be given consideration.

Under the drug store ownership law a pharmacist may own fifty stores; certainly he could not personally manage all of them, inasmuch as one pharmacist cannot personally manage even one drug store. He would, therefore, have to rely on employed pharmacists for all of his other stores just the same as a corporation or a partnership, all of whose stockholders or members were not registered pharmacists.

What evil is to be guarded against by the combination of management and ownership referred to by Judge Dickinson or what benefit is to accrue to the public in no wise appears. The truth is that the

act in its essence simply creates a monopoly in registered pharmacists, and deprives corporations—all of whose stockholders are not registered pharmacists—of business and property rights, without benefit to the preservation of the public health, and in violation of the due process and equal protection clauses of the United States Constitution.

XI. Errors in the opinion of the Court of Common Pleas of Philadelphia County.

Contemporaneously with the institution of the present statutory proceedings in equity, George B. Evans, a Pennsylvania corporation, filed its petition in the Court of Common Pleas No. 4 of Philadelphia County in pursuance of the Pennsylvania Uniform Declaratory Judgments Act of June 18, 1923, P. L. 840, in order to determine the constitutionality of the Act of 1927. The petitioner, like the appellant, was engaged in the business of operating retail drug stores in Pennsylvania, its business being then carried on at seven retail drug stores owned by it and located in the City of Philadelphia upon premises leased by it.

The hearing was upon petition and answer; and the Act was held constitutional. This decision was rendered after that of the District Court in the present case. An appeal was taken by the George B. Evans corporation from this judgment to the Supreme Court of Pennsylvania; and was argued the latter part of January, 1928. No decision has yet been rendered by the Supreme Court of Pennsylvania. Of course, any decision by the Supreme Court of Pennsylvania in that case could not reach this Court because the action is but a declaratory judgment upon a moot question.

We think it probable that appellees will call attention to this decision. We shall, therefore, say a few words concerning the only new reasons therein stated for sustaining the Act.

(*a*) The Common Pleas Court suggest that a proprietor or owner of a drug store, who is himself a registered pharmacist, is in a better position to select other competent registered pharmacists to attend to the practical work of the pharmacy. So the law which forbids any but registered pharmacists to own, be partners in, or hold stock in a corporation which owns a drug store is justified!

1. What becomes of the Act of May 17, 1917 (P. L. 207) which governs the examination and registration of pharmacists? This gives them the legal right upon receiving their certificate of competency to compound medicines. Is the registered pharmacist owner to become a super-examining-board to revise the work of the State Board of Pharmacy? If he so constitutes himself and discharges from his employ a registered pharmacist he thinks unskilled or unworthy, what is to prevent that very same discharged pharmacist from owning and operating his own drug store, or at once becoming an employee in another drug store? Nothing. He still holds his license.

2. If the legislature wished to raise the skill and character of registered pharmacists, the way to do it was to pass a law increasing the requirements for registration. What an oblique, strained and unnecessary way to reach the situation to provide that only registered pharmacists should own or be partners or stockholders in drug stores.

3. But what of the fact that the ownership law only requires the registered pharmacist to *own* and not to *manage* his store nor to hire pharmacists or other employees? Did the court overlook the fact that he might have a manager over his pharmacist employees, who is not a registered pharmacist and who could hire the help? What becomes of the argument when this is considered?

Besides, a corporation could have a pharmacist as its employment director who could hire the pharmacist help. It would not be requisite that all the stockholders participate in the hiring of employees, and that each pharmacist employed should stand an examination by each of the pharmacist stockholders.

(*b*) This Court of Common Pleas ventures the conjecture that the Legislature thought that a proprietor, who is a registered pharmacist will supervise more intelligently and effectively the conduct of those employed in the drug store. We presume that the court refers to the pharmacy end of the drug store and not to the merchandise (non-pharmaceutical) branch of the business. But where do we find, within the four corners of the Act, any provision that requires the registered pharmacist owner to supervise the conduct of his employees? In addition, a pharmacist may have charge of but one pharmacy at the same time; what then becomes of such supervision where the registered pharmacist owns several stores as he is expressly permitted to do under the 1917 Act, and is not forbidden to do under the 1927 Supplement?

It is, of course, obvious that a pharmacist working for the corporation will supervise just as effectively as one who works for a pharmacist.

(*c*) It is suggested that the act will bring the proprietor of a drug store into direct relation with the Pharmacy Board and thus facilitate the efforts of that Board to enforce the laws covering the obligations incident to the ownership of retail drug stores. It is to be remembered that the General Pharmacy Act of Pennsylvania (Act of May 26, 1921, P. L. 1172, quoted *supra*, p. 25), requires every *drug store* to be registered, requires the registration to be renewed every year, and permits the refusal or revocation of such registration for violations of the act or violations of other law having to do with the conduct of the business of a pharmacy. It is perfectly evident, therefore, that whether the owner of a drug store be a corporation whose members are all pharmacists, or a corporation whose members are not pharmacists, such owner must obey the law and must keep in touch with and comply with the regulations made by the Pharmacy Board pursuant to law. In this aspect there is not one whit of difference between the pharmacist owner and the non-pharmacist owner.

The theory that the pharmacist owner will keep in closer touch with the State Board of Pharmacy seems to us to fail utterly when it is remembered that under the provisions of the ownership act of

May 13, 1927, here under attack, the pharmacist owner need not work in his store, need not be in his store, need not manage his store, but may live three thousand miles from it. It seems to us that the suggestion of the learned court is illusory.

G. CONCLUSION.

In conclusion, we submit that the drug store ownership law of May 13, 1927, is not a health measure; that its passage was dictated by economic considerations and not in the interest of the public health or safety; that its plain purpose is to limit the competition of corporations with individuals in the conduct of what is universally recognized as a business—the conduct of drug stores.

We submit further that the State of Pennsylvania, even if its legislature intended the Act of May 13, 1927, to be a police regulation in the interest of the public health, cannot act arbitrarily and unreasonably, cannot adopt a measure which has no real relation to the public health, on the strained and unreasonable hypothesis that by regulating something else having no real relation to the public health, to wit, the ownership of certain kinds of business, it may as a result of the process accomplish some object connected with the public health. We contend that the authorities establish the proposition that a police measure, to be sustainable, must have a direct and reasonable bearing upon the supposed evil intended to be regulated.

For the reasons, therefore, that the legislation under attack unnecessarily and improperly destroys business and property rights having no reasonable relation to the health of the community, seeks to create a monopoly, and thus deprives the appellant of the equal protection of the laws, we submit that

the decree of the court below should be reversed and a decree entered enjoining and restraining the appellees from enforcing the provisions of the Act of May 13, 1927, by forfeitures of appellant's rights and by criminal prosecutions.

Respectfully submitted,

GEORGE G. CHANDLER,
ROY M. STERNE,
OWEN J. ROBERTS,
Attorneys for Appellant.